

State “Competitor Veto” Laws and the Right to Earn a Living: Some Paths to Federal Reform

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Abstract

The certificate of public convenience and necessity (CPCN) is a type of licensing requirement which blocks new businesses from starting up unless they first prove to the government that a new competitor is "needed." These laws—which are on the books in most states and major cities—are said to prevent "destructive" competition, but they are better explained as a tool existing firms use to block competition for their own profit. Until recently, there has been little empirical research on how this occurs, but in February 2014, a federal court in Kentucky struck down that state's CPCN law for moving companies. This article uses the evidence uncovered in that case and similar lawsuits in other states to demonstrate how CPCN laws actually operate, and why federal reform is necessary to preserve the constitutional right to economic liberty. It proposes three possible federal reforms and potential objections to those reforms.

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State “Competitor Veto” Laws and the Right to Earn a Living:

Some Paths to Federal Reform

Timothy Sandefur

The certificate of public convenience and necessity (CPCN) is a type of licensing requirement devised in the nineteenth century that today applies to a wide variety of industries. Unlike other types of licensing laws, CPCN requirements do not impose educational or training criteria on persons seeking to enter an industry; instead, CPCN laws block any new firms from operating unless they can prove to the licensing agency that new competition is in “the public interest,” or some similar criterion. Although originally devised for the railroad industry,¹ CPCN requirements today regulate taxicabs, limousines, moving companies, ambulances, and even hospitals and nursing schools.²

When first devised, the economic theory behind these laws was that, under certain circumstances, economic competition is “inefficient” and “destructive,” so government should prevent “excess entry” into the market. But CPCN requirements are now employed to restrict entry into ordinary, competitive markets that lack the characteristics of markets theoretically at risk for “excess entry.” And given that CPCN laws do not restrict, or even purport to restrict, dangerous or dishonest business practices—which are addressed by different laws—CPCNs in these ordinary markets cannot be explained as regulation in the public interest. Instead, they are better explained by public choice theory: CPCN laws are tools by which incumbent firms bar

¹ See generally William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426 (1979).

² In the medical field, they are typically called Certificate of Need laws. See National Conference of State Legislatures, *Certificate of Need: State Health Laws and Programs*, <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx> (visited Oct. 20, 2014).

competition for self-interested reasons. These laws enrich existing businesses by restricting the supply of services, raising prices for consumers, and—worst of all—depriving would-be entrepreneurs of their constitutional right to earn a living without unreasonable government interference.

In the 1980s, the federal government rolled back many CPCN requirements at the national level, with a resulting boost to economic productivity and decreases in prices.³ Other countries report similar benefits from deregulation.⁴ But CPCN laws remain on the books in many states and municipalities, and they are rarely called to account for their economic consequences or their constitutional legitimacy.

Until recently, it has been difficult to demonstrate the precise effects of CPCN laws, because while they have been the subject of extensive theoretical literature, there has been little empirical research on the effects of these laws in ordinary competitive markets.⁵ But in February 2014, the United States District Court for the Eastern District of Kentucky held that the state’s CPCN law for moving companies violated the Fourteenth Amendment because it deprived entrepreneurs of the right to engage in the moving trade and was in no way related to protecting public health, safety, or welfare.⁶ The evidence uncovered during that litigation—like

³ See generally Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and the Use of Independent Owner-Operators over Time*, 35 *TRANSP. L.J.* 115, 117–33 (2008); Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* (FTC Bureau of Economics Staff Report, May, 1984).

⁴ Sean Barrett, *Regulatory Capture, Property Rights and Taxi Deregulation: A Case Study*, 23 *ECON. AFFAIRS* 34 (2003).

⁵ There remains a dearth of empirical evidence of the effects of CPCN laws on prices and availability for intrastate household goods moving services. There is much research relating to the *interstate* moving industry—see, e.g., Dennis A. Breen, *The Monopoly Value of Household-Goods Carrier Operating Certificates*, 20 *J.L. & ECON.* 153 (1977)—and the freight industry—see, e.g., James R. Frew, *The Existence of Monopoly Profits in the Motor Carrier Industry*, 24 *J.L. & ECON.* 289 (1981)—although this research is largely from the late 1970s and early 1980s, when federal regulatory reforms were underway. There is no reason to believe that relevant factors have changed in the interim, but it is difficult to obtain reliable figures of prices for intrastate household goods services today. This difficulty is complicated by the fact that many states impose price-fixing rules (“tariffs”) on movers or allow industry groups to do so, thereby making it difficult to determine the market rate for moving services.

⁶ *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014).

evidence revealed in a similar case in Missouri in 2012⁷—shows how CPCN laws actually operate and demonstrates the need for reform that will not only improve living standards by reducing unnecessary barriers to entry, but also better secure the vital constitutional right to economic liberty.

This article begins with the historical and legal framework of that right and the constitutional doctrine that today governs the states' authority to restrict economic liberty. It then examines the CPCN law's effects on moving companies in Kentucky and other states and how federal deregulation in the 1980s helped curtail similar abuses at the federal level. The article concludes with a brief sketch of possible reforms and potential federalism-based objections to those reforms.

I. Economic Liberty as a Fundamental Civil Right

A. Economic Liberty and the Constitution

The freedom to make one's own economic choices is a key liberty that the Constitution was written to protect and that the Fourteenth Amendment promises to secure against state interference. The right to earn a living without unreasonable government interference is deeply rooted in the Anglo-American common law and in America's tradition of rugged individualism.⁸ In the 17th century, a series of decisions by English courts held that government-imposed monopolies on trades, in the form of exclusive trading privileges⁹ or

⁷ *Munie v. Koster*, 4:10CV01096 AGF, 2011 WL 839608 (E.D. Mo. Mar. 7, 2011). This case was dismissed as moot when Missouri repealed the challenged CPCN statute, but the facts of the case are detailed in Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 GEO. MASON U. CIV. RTS. L.J. 159 (2014).

⁸ See generally TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* 17–25 (2010); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983 (2013).

⁹ See, e.g., *Darcy v. Allen (The Case of Monopolies)*, 77 Eng. Rep. 1260 (K.B. 1602).

rules imposed by guilds,¹⁰ were contrary to the common law and the guarantees of Magna Carta. By the time of the American Revolution, English courts had held for more than a century that “no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil . . . and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade.”¹¹

America’s founders were well versed in this Whig antimonopoly tradition,¹² and they regarded the pursuit of a trade as essential to the pursuit of happiness. In his 1774 *Summary View of the Rights of British America*, Thomas Jefferson complained of British trade restrictions that barred colonists from manufacturing things out of iron but forced them to ship the iron to Britain to be made into retail items. Such laws violated the “natural right” of “the exercise of a free trade with all parts of the world”¹³ and deprived the colonists of economic liberty “for the purpose of supporting not men, but machines, in the island of Great Britain.”¹⁴ Likewise, in 1792, James Madison wrote that any government that imposes “arbitrary restrictions, exemptions, and monopolies” that “deny to part of its citizens [the] free use of their faculties, and free choice of their occupations” so as to benefit the economic interests of others is “not a just government.”¹⁵

The most egregious violation of this principle of economic liberty was slavery, an institution that deprived slaves of the right, and relieved masters of the moral obligation, to make

¹⁰ See, e.g., *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614).

¹¹ *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218, 1219 (K.B. 1615).

¹² Foremost among the spokesmen for this tradition was Chief Justice Sir Edward Coke (1552–1634), author of *Tooley*, 80 Eng. Rep., *Case of the Tailors*, 77 Eng. Rep., and many other similar cases, and who in retirement authored *The Institutes of the Common Law*. These books—in which Coke reiterated the importance of the common law’s prohibition on monopolies—were the basic legal textbooks for law students in the American colonies, and were closely read by such lawyers as Thomas Jefferson and John Adams. See generally CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE OF SIR EDWARD COKE* (1957).

¹³ Thomas Jefferson, *A Summary View of the Rights of British America* (1774), reprinted in JEFFERSON: WRITINGS 109–10 (M. Peterson, ed. 1984).

¹⁴ *Id.* at 109.

¹⁵ James Madison, *Property* (1792), reprinted in MADISON: WRITINGS 516 (J. Rakove ed., 1999).

their own economic choices. Escaped slave Frederick Douglass recalled in his memoirs the joyful sense of liberation he felt when he received his first wages as a free man: “To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—*that it was mine—that my hands were my own*, and could earn more of the precious coin—one must have been in some sense himself a slave.”¹⁶

Still, even after the formal end of slavery, Southern states persecuted former slaves by imposing a variety of legal restrictions on their right to earn a living. Thus, in 1866, when Congress enacted the nation’s first Civil Rights Act, it specified economic liberty as a right that the federal government would protect against state interference: “All persons . . . shall have the same right in every State . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of . . . property as is enjoyed by white citizens, and shall be subject to like . . . taxes, licenses, and exactions of every kind, and to no other.”¹⁷ When the constitutionality of that Act was disputed, Reconstruction Republicans drafted the Fourteenth Amendment to protect Americans from oppression by states.¹⁸ Again, one of the rights the amendment’s champions singled out as in need of federal protection was the right to economic liberty. Representative John Bingham, one of the amendment’s principal authors, explained that it would protect, among other rights, “the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen and to be secure in the enjoyment of the fruits of your toil.”¹⁹

¹⁶ *Frederick Douglass, The Life and Times of Frederick Douglass* (1893), reprinted in DOUGLAS: AUTOBIOGRAPHIES 654 (Henry Louis Gates, Jr., ed. 1994).

¹⁷ 14 Stat. 27 (1866), codified as amended 42 U.S.C. § 1981.

¹⁸ See generally MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1990); AKHIL REED AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2008).

¹⁹ *Cong. Globe*, 42d Cong., 1st Sess. app. 86 (1871).

Belief in the dignity of labor and the right to economic freedom animated not only much of the antislavery movement, but also the ratification of the Fourteenth Amendment and the ensuing era of what is today often called “laissez-faire constitutionalism.”²⁰ From the premise that a person has a natural right to his own faculties, and the right to employ those faculties to earn a living for himself and his family, came a reinvigorated commitment to constitutional protection for the right to economic freedom. When California sought to block Chinese immigrants from competing in the labor market, courts ruled that these restrictions violated the Fourteenth Amendment.²¹ Courts also barred states from seizing railroads’ assets without compensation,²² from using taxpayer money to subsidize politically influential private businesses,²³ and from dictating the terms of employment to workers and business owners.²⁴ Though the courts allowed many government restrictions on economic liberty to stand,²⁵ the ratification of the Fourteenth Amendment helped usher in an era in which state laws unjustly interfering with that freedom were often ruled unconstitutional.²⁶

²⁰ See generally Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 973 (1975); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974). See also DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011).

²¹ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²² See, e.g., *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

²³ See, e.g., *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874).

²⁴ See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905).

²⁵ See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER 50* (2011) (observing that federal courts upheld a large number of economic regulations during the so-called *Lochner* era).

²⁶ By no means were these principles consistently followed. Although in cases like *Yick Wo*, 118 U.S., and *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), the Court protected economic liberty against unjust interference, it was often neglectful of this charge. Thus in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), it refused to invalidate Louisiana’s slaughterhouse monopoly, and in *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1876), it allowed price regulation of non-monopoly industries. Worse, women were almost wholly excluded from the right to economic liberty; the Court upheld restrictions on this freedom in cases like *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), and *Muller v. Oregon*, 208 U.S. 412 (1908). In *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), however, the Court overruled those cases, finding that the ratification of the Nineteenth Amendment had signaled the end of the era of female subservience: “we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.” *Id.* at 553. See further David E. Bernstein, *The Feminist “Horseman,”* 10 GREEN BAG 2D 379 (2007).

B. The Rational Basis Test

That era came to an end in the 1930s with a series of cases in which the Supreme Court endorsed a new Progressive theory of constitutional law that dramatically expanded, at both the state and federal levels, government power over economic freedom and private property.²⁷ The most important such decision was *Nebbia v. New York*,²⁸ which announced a new “rational basis test” for determining the constitutionality of restrictions on economic freedom.²⁹ Under this test, such a law is presumed constitutional and will be ruled invalid only if the plaintiff proves that it lacks any rational connection to a legitimate government interest. This test is extremely deferential to the government; a plaintiff is required to disprove every plausible justification for the law.³⁰

Scholars and judges have criticized the rational basis test for many reasons,³¹ but two of its flaws are relevant here. First, such extreme deference blinds courts to the unjust consequences that public choice theorists would predict in circumstances where pressure groups can freely impose burdens on rivals. The extreme deference of the rational basis test “invites [judges] to cup [their] hands over [their] eyes and then imagine if there could be anything right with the statute,”³² a degree of deference to majoritarianism that contrasts with the attentive skepticism that marked the Constitution’s authors. They were well aware that “a pure democracy . . . can admit of no cure for the mischiefs of faction” because “there is nothing to check the inducements to sacrifice the weaker party” to the power of the majority or the well-organized pressure

²⁷ See generally BERNARD SEIGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 184–203 (1980).

²⁸ 291 U.S. 502 (1934).

²⁹ *Id.* at 537.

³⁰ Courts have sometimes formulated the contours of this test in different ways. See generally Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary “Perplexity,”* 24 GEO. MASON U. CIV. RTS. L.J. 43 (2014).

³¹ See, e.g., *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012), *cert. denied*, 133 S.Ct. 1489 (2013); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J.L. & LIBERTY 898 (2005); Timothy Sandefur, *Disputing the Dogma of Deference*, 18 TEX. REV. L. & POL. 121 (2014).

³² *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

group.³³ Accordingly, they designed a system of checks and balances, including an independent judiciary that would serve as “an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority.”³⁴ But by withdrawing meaningful judicial review, the rational basis test allows politically well-connected participants to exploit the legislative or regulatory process for their own profit, with only flimsy excuses of benefiting the general public. The result is to deprive those with little political influence of rights that ought to be constitutionally secured.³⁵

A second problem relates to federalism. Commentators often ignore the degree to which *Nebbia* represented a throwback to the antebellum states’ rights theory of federalism. That theory had two basic premises:³⁶ first, that states, not the federal government, are the fundamental focus of sovereignty and legitimacy, so that notwithstanding federal supremacy, a citizen’s rights should be subject to state restrictions with little, if any, intervention from the federal government; and second, that federal courts lacked the legitimacy or competence to evaluate the states’ “domestic institutions.” The authors of the Fourteenth Amendment, by contrast, had hoped to provide an independent check on state authority, partly through the federal courts, to protect the rights of all Americans against states, which were seen as dangerously unaccountable under the 1787 Constitution. The new order of the Fourteenth Amendment was thus premised on suspicion of state power and emphasized federal guarantees that would make good on the promise of national citizenship.³⁷ But *Nebbia* restored deference

³³ THE FEDERALIST No. 10 (James Madison) at 61 (J. Cooke, ed. 1961).

³⁴ *Id.* No. 78 at 525 (Alexander Hamilton).

³⁵ See *Hettinga*, 677 F.3d at 482–83 (Brown, J., concurring) (“[T]he practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.”).

³⁶ See further TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION 33–43 (2014).

³⁷ See *id.* at 59–70.

to the states and withdrew Due Process guarantees from all but the most egregious cases.³⁸ Later decisions softened the blow somewhat by promising greater federal protections to “discrete and insular minorities” and for certain specified rights;³⁹ this shift gave rise to today’s infamous double standard, which provides greater judicial protection of rights like speech, religion, and travel while almost entirely abdicating federal protection for the equally essential rights of economic freedom and private property.⁴⁰

Today, courts are highly sensitive to the dangers of rent-seeking in some areas of the law. For example, in cases involving the Dormant Commerce Clause,⁴¹ or involving noneconomic matters such as religious freedom or free speech,⁴² courts employ more exacting scrutiny, and generally bar politically influential groups from using state power to exclude rivals or to impose burdens on them for self-interested purposes. In those contexts, a rigorous judicial conception of the public good—devoted to the principles of “national free trade”⁴³ or the “marketplace of ideas”⁴⁴—ensures that courts invalidate efforts by rent-seeking groups to exploit political power for their own benefit. Baptists cannot typically exclude Catholics or atheists from starting competing institutions, promoting their messages, or vying for converts,⁴⁵ nor can states normally grant privileges to their own citizens by blocking economic competition from other states.⁴⁶ But when it comes to the rights of entrepreneurs and private property owners, courts

³⁸ See, e.g., *Nebbia*, 291 U.S. at 524.

³⁹ See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). The “more exacting scrutiny” promised in *Carolene Products* became the “strict scrutiny” first applied in *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴⁰ Thus, as Justice Clarence Thomas has observed that “citizens are safe from the government in their homes, [but] the homes themselves are not.” *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).

⁴¹ See generally RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 227–44 (2014).

⁴² Many such cases cannot really be described as “non-economic,” in that they deal with the purchase and sale of books or newspapers, or paid solicitation, or other crossovers between economic and non-economic realms.

⁴³ See, e.g., *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538–39 (1949).

⁴⁴ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁴⁵ Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

⁴⁶ See generally *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997).

apply *Nebbia*'s lenient rational basis test, which typically means closing the judiciary's eyes to the rent-seeking shenanigans that result in anti-competitive laws, or even devising dubious post-hoc rationalizations in order to uphold those laws.

This practice is nowhere more evident than in the realm of occupational licensing laws, which serve as barriers to entry to entrepreneurs who would otherwise enter the market to earn a living, thus increasing competition and decreasing consumer prices. Excessive judicial deference to state governments has cultivated a legal environment that encourages existing firms to demand more restrictive licensing laws, to police rivals for possible infractions, and to otherwise devote resources to blocking new entrants. Thanks to the rational basis test, they typically get away with it. For example, in *Meadows v. Odom*,⁴⁷ a federal district court in 2005 upheld a Louisiana licensing requirement for florists, ignoring extensive evidence that the law was adopted solely to protect established florists against new competition. The court ruled that the law might somehow protect consumers against having their fingers scratched by the wires that florists use to hold their flower arrangements together. Such a laughable rationalization for the law—which lacked any evidentiary support—allowed incumbent firms to prevent competition to deprive Sandy Meadows of her right to earn a living by arranging flowers.⁴⁸

Perhaps most shocking is the Tenth Circuit Court of Appeals' 2004 decision in *Powers v. Harris*,⁴⁹ which holds that government may restrict economic competition without requiring any public-interest justification. The court held that “intrastate economic protectionism constitutes a legitimate state interest,”⁵⁰ a proposition that flies in the face of the entire philosophical

⁴⁷ 360 F. Supp. 2d 811 (M.D. La. 2005).

⁴⁸ See further Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 401–3 (2012).

⁴⁹ 379 F.3d 1208 (10th Cir. 2004).

⁵⁰ *Id.* at 1221.

framework of due process of law—indeed, of constitutionalism itself.⁵¹ The *Powers* decision holds that whatever government chooses to do in the realm of economics passes the legitimacy test simply because the government has chosen to do it. A licensing restriction need not advance any public purpose, such as public safety or even some broadly conceived public welfare goal; a law that blocks economic opportunity on pure *ipse dixit* is still a lawful application of government power: “while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments,” the *Powers* decision states.⁵² Under that decision, legislatures are not only allowed to indulge in the mischiefs of faction; they are almost invited to revel in it. Citizens, meanwhile, are instructed that if they seek protection for individual rights, they “must turn to the [state] electorate”⁵³ rather than to the Fourteenth Amendment—when that amendment’s very purpose was to shield individual rights from the vicissitudes of political controversy.⁵⁴

Other courts of appeal have rejected the extreme degree of deference articulated in *Powers* and have held that occupational licensing laws must relate to at least *some* concept of the public good. The Fifth,⁵⁵ Sixth,⁵⁶ and Ninth⁵⁷ Circuits have ruled that economic protectionism is not a legitimate government interest for purposes of rational basis review, and that licensing restrictions must relate to protecting the public from fraud, incompetence, or other harms. Yet the rational basis test’s deferential attitude toward government regulation leaves even this principle vulnerable.

⁵¹ See SANDEFUR, CONSCIENCE OF THE CONSTITUTION, *supra* note 36, at ch. 3.

⁵² *Powers*, 379 F.3d at 1221.

⁵³ *Id.* at 1222.

⁵⁴ See *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637–38 (1943).

⁵⁵ *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221–23 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013).

⁵⁶ *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

⁵⁷ *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

Consider the Fifth Circuit’s 2013 decision in *St. Joseph Abbey v. Castille*,⁵⁸ which struck down a licensing law that required people who sell caskets to obtain funeral director licenses. The court held that the plaintiffs—a group of monks who made and sold coffins—did not practice the trade of funeral directing, so it was absurd to force them to undergo the expensive and time-consuming process of learning the skills of funeral directing and obtaining a funeral director’s license. The court found that the requirement bore no rational connection to protecting the public from any realistic danger. But in rejecting the state’s “threshold argument” that it could protect licensed funeral directors against competition regardless of any connection to the public interest,⁵⁹ the court added a significant—and possibly fatal—caveat: “economic protection, that is favoritism, may well be supported by a *post hoc* perceived rationale . . . without which it is aptly described as a naked transfer of wealth.”⁶⁰

The court cited an earlier decision⁶¹ that upheld a licensing law for taxicabs, under which larger, established firms were accorded special privileges that were denied to smaller firms and to those wanting to start new firms. To operate a taxi in Houston, as in many other cities and states, a person must first obtain a CPCN from a regulatory agency. Each CPCN allows the holder to operate one taxicab. After having long capped the number of CPCNs available, the city decided to issue 211 new certificates using a weighted lottery system. Under this system, companies that already held 80 or more CPCNs were classified as “large,” those with 25–79 as “mid-large,” those with 4–24 as “mid-small,” and so forth.⁶² Large firms were then eligible to receive one of 28 new certificates, while the mid-large firms were eligible to

⁵⁸ *St. Joseph Abbey*, 712 F.3d..

⁵⁹ *Id.* at 222.

⁶⁰ *Id.* at 222–23.

⁶¹ *Greater Houston Small Taxicab Co. Owners Association v. City of Houston*, 660 F.3d 235 (5th Cir. 2011).

⁶² *Id.* at 237.

receive one of 12, and so on. For each category, the number of available certificates diminished over the second, third, and fourth years, but in each year, the number was skewed in favor of large firms. In total, large firms were entitled to more than half of the new CPCNs, while mid-large firms could only receive one-fifth of them. New entrants who held no certificates would be eligible to receive only one of 11 new ones in the first year and none in the second, third, or fourth years.⁶³

The small firms challenged this scheme on the grounds that it was devised simply to protect the market position of large firms against competition from newcomers. But the court upheld it. “[T]he larger the taxi company, the more likely it is to offer a broader range of services that better serve consumer needs,”⁶⁴ the court observed. Thus, it was legitimate for the city to accord the large firms special privileges. Yet it is bizarre to suppose that granting more licenses to established firms and sharply restricting new entrants would “foster enhanced competition,”⁶⁵ as the court claimed, or increase the quality of taxi service.

The court shrugged at these objections because “the rationality standard is a low threshold.”⁶⁶ Although it refused to go as far as the *Powers* court and hold that protectionism per se is a legitimate interest, the Fifth Circuit held that “promoting full-service taxi operations is a legitimate government purpose” that the biased licensing scheme would accomplish.⁶⁷ And *Castille* relied on this precedent to conclude that “economic protectionism in service of the public good” would pass constitutional muster.⁶⁸ But protectionist legislation is virtually always predicated on the notion that “promoting” the protected industry is somehow good for society. If

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 240.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Castille*, 712 F.3d at 226.

future courts indulge anticompetitive licensing schemes whenever the legislature claims that such a scheme serves the public interest in some vague sense, it will be all too easy for lawmakers to evade the constitutional restriction. Such deference transforms the rule against “naked preferences”⁶⁹ into what Justice Sandra Day O’Connor has called the “stupid staffer” test,⁷⁰ or what the antifederalist “Brutus” once called “a most pitiful restriction.”⁷¹ Since government will always say that what it does is in the public interest, requiring legislation to serve the public interest means nothing unless courts exercise some independent judgment on the merits of that question.

If there is to be any substantial meaning to the rule against “mere economic protection of a particular industry,”⁷² it must take the form of courts examining whether the need for protectionism actually exists, and whether the law in question actually promotes the public good more effectively than some more procompetitive policy would. As we will see, existing Supreme Court precedent provides helpful guidance on this point.

⁶⁹ Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (“[T]he dormant commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses . . . are united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want. I . . . call this underlying evil a naked preference.”).

⁷⁰ *Kelo*, 545 U.S. at 502 (O’Connor, J., dissenting) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025–26, n. 12 (1992)).

⁷¹ *Brutus VI*, in 1 DEBATE ON THE CONSTITUTION 618–19 (Bernard Bailyn ed., 1993) (“It is as absurd to say, that the power of Congress is limited by these general expressions, ‘to provide for the common safety, and general welfare,’ as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, &c. at will and pleasure. Were this authority given, it might be said, that under it the legislature could not do injustice, or pursue any measures, but such as were calculated to promote the public good, and happiness. For every man, rulers as well as others, are bound by the immutable laws of God and reason, always to will what is right. It is certainly right and fit, that the governors of every people should provide for the common defence and general welfare; every government, therefore, in the world, even the greatest despot, is limited in the exercise of his power. But however just this reasoning may be, it would be found, in practice, a most pitiful restriction. The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves.”).

⁷² *St. Joseph Abbey*, 712 F.3d at 222.

C. Constitutional Limits on Licensing Laws

The Supreme Court has always held that the Due Process Clause forbids states from imposing occupational licensing laws that lack a rational connection to the applicant's skill in practicing the trade. Its first pronouncement on licensing, *Dent v. West Virginia*,⁷³ upheld a licensing requirement for doctors, finding that such laws are constitutional so long as the training and education standards are "appropriate to the calling or profession, and attainable by reasonable study or application."⁷⁴ But it warned that requirements that lack such a relationship, or standards that "are unattainable by such reasonable study and application," would unconstitutionally "deprive one of his right to pursue a lawful vocation."⁷⁵ *Dent* was decided before the advent of rational basis scrutiny, but the Court has reaffirmed its holding since then, most notably in *Schwartz v. Board of Examiners*.⁷⁶ There, the Court held that New Mexico could not prohibit Communist Party members from obtaining law licenses. Although states may "require high standards of qualification" for entry into a profession, the Court held, "any qualification must have a rational connection with the applicant's fitness or capacity to practice the law."⁷⁷ While this test retains the deference of the rational basis scheme, it imposes a meaningful limit by requiring that the licensing rules relate to the person's qualifications or suitability for the business in question.⁷⁸

⁷³ 129 U.S. 114 (1889).

⁷⁴ *Id.* at 122.

⁷⁵ *Id.* at 122. *Dent* was written by Justice Stephen J. Field (1816–1899), the Supreme Court's foremost defender of economic liberty. See generally PAUL KENS, STEPHEN J. FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 17–28 (1997).

⁷⁶ 353 U.S. 232 (1957).

⁷⁷ *Id.* at 239.

⁷⁸ See, e.g., *Dittman v. California*, 191 F.3d 1020, 1030 (9th Cir. 1999) ("*Schwartz* makes clear [that] although a state may regulate entry into a profession, any such regulation must be rationally related, not merely to a legitimate state interest, but more specifically to the 'the applicant's fitness or capacity to practice' the profession itself.>").

This “fitness or capacity” test is grounded in the basic principles of due process of law, which forbid government from restricting liberty arbitrarily, or simply to benefit those who happen to wield political authority.⁷⁹ The freedom to enter a trade may be restricted in order to protect the general public from harm, but the state may not restrict this freedom simply out of animosity or to protect the market position of dominant firms.

II. Certificate of Public Convenience and Necessity Laws

A. The Theory of CPCN Laws

CPCN laws differ from ordinary licensing requirements in that they bear no connection to the applicant’s fitness or capacity to practice the trade. Instead, such laws are expressly aimed at preventing new firms from entering an industry unless the licensing officials are persuaded that more competition is desirable.

Different laws characterize this desirability in different ways, but typically they require an applicant to demonstrate that allowing a new firm to enter the industry would be consistent with the public interest, or that existing services are inadequate, or something to that effect. Such laws are often written in extraordinarily vague terms. A recent Illinois case,⁸⁰ for example, involved a city ordinance that required a CPCN for operators of “vehicle for hire” companies; under that ordinance, the city manager would grant a CPCN if he or she found “that further vehicle for hire service . . . is desirable and in the public interest”—whatever that meant.⁸¹ Other CPCN laws are explicitly anticompetitive. Nevada’s CPCN law for taxis, limousines, and moving companies requires an applicant to prove, among other things, that his new business

⁷⁹ See generally SANDEFUR, CONSCIENCE OF THE CONSTITUTION, *supra* note 36, at 71–94.

⁸⁰ Crowe v. City of Bloomington, Case No. 12-MR-45 (11th Judicial Circuit Court, McLean County, Aug. 28, 2013).

⁸¹ See *id.* at ¶ 3 (quoting Bloomington City Code §§ 1002A).

“will [not] unreasonably and adversely affect other carriers operating in the territory” and will not “create competition that may be detrimental to . . . the motor carrier business.”⁸² Other states also expressly require the licensing agency to consider the economic impact a new firm will have on existing firms when deciding whether to grant a new certificate.⁸³

Ordinarily, a CPCN law works as follows. An entrepreneur wanting to start a firm must first apply for a certificate, which entails submitting extensive financial information and proof of insurance and undergoing a criminal background check. The applicant may also be asked to describe his or her proposed area of operations. Upon filing an application, the agency offers the firms that already hold CPCNs—the existing businesses in the industry—the opportunity to object to the issuing of a new CPCN to the applicant. If any firm files an objection, the applicant must then participate in a hearing before the agency to prove that a new firm is desirable, under the criteria listed in the statute—for instance, that a new firm is in “the public interest.” While an applicant’s qualifications are one consideration (usually phrased as whether the applicant is “fit, willing, and able”), they are not the only one; CPCN laws usually give the agency extremely broad discretion over whether a new firm is desirable.

Because CPCN laws enable established firms to file an objection that triggers the hearing requirement—a barrier to entry that in practice is often insurmountable to the applicant—these laws have sometimes been called the Competitor’s Veto. Like the more famous “Heckler’s Veto” in First Amendment jurisprudence, which enables an audience member to silence a speaker whose message he or she does not want to hear, the Competitor’s Veto enables existing firms to disallow their potential competition.

⁸² NEV. REV. STAT. §§ 706.391, 706.151(1)(e).

⁸³ See, e.g., Sandefur, *A Public Convenience*, *supra* note 7, at 177 (citing Missouri as an example).

The CPCN was invented in the late nineteenth century to regulate the railroad industry.⁸⁴ That industry had some monopoly characteristics and was regulated as a common carrier, which meant that the government imposed certain diseconomies to compensate for the monopoly advantages railroads enjoyed. For example, railroads were often allowed to exercise the government's power of eminent domain in order to lay tracks, in exchange for which the railroad was required to serve all customers without discrimination, or to submit to rate regulation or other restrictions. These diseconomies raised the specter of "cream-skimming," a phenomenon in which a competitor can enter a market and, not being subject to such restrictions, perform more efficiently.⁸⁵ At a time when railroads and streetcars were typically operated by private investors, cream-skimming was seen as a disincentive to private investment in such utilities. Who would devote money to building a railroad or streetcar line subject to regulatory burdens if a competitor might swoop in the next day with a cheaper, less regulated line? Proponents of CPCN laws thought they would resolve this concern and encourage private investment in public utilities.⁸⁶

Another rationale for CPCN laws was the concept of "destructive competition," which was fashionable in economic circles in the early twentieth century. According to this theory, unregulated competition was dangerously inefficient because the lag time between a spike in demand and the increase in supply meant that new supplies would become available only when demand had begun to fall, leaving producers with undesired goods and collapsing prices. CPCN laws would prevent this purported tendency toward inefficiency by delaying producers' ability to respond to increases in demand.⁸⁷ This theory—like most economic thinking predicated on the notion that economic competition is inefficient—is now largely obsolete. Economists now

⁸⁴ See Jones, *supra* note 1, at 431.

⁸⁵ See 2 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION* 7 (1971).

⁸⁶ See further Sandefur, *A Public Convenience*, *supra* note 7, at 168–70.

⁸⁷ See 2 KAHN, *supra* note 85 at 174.

recognize that free competition produces efficient outcomes and that the inefficiencies created by government's efforts to force firms to "act in concert"⁸⁸ are far more trouble than they are worth.⁸⁹ Firms are the best judges of whether it is worth responding to rapid demand increases, or whether a passing fashion will leave them holding the bag. And supply and demand is the only mechanism for determining what level of output is economically efficient.⁹⁰

The concept of "destructive competition" or "excess entry" can still be found in the economic literature. But the theory applies only to industries with high start-up costs, homogenous goods or services, and oligopolistic competition.⁹¹ Such circumstances are rare, and certainly are not present in the taxi, limousine, or household goods moving markets. Indeed, it is difficult to imagine an industry with more heterogeneous services or lower start-up costs than the moving industry, and any oligopoly in these markets is the result, rather than the cause, of government intervention.⁹² The downsides to restricting competition—in particular, the pervasive knowledge and rent-seeking problems—seem to overwhelm any potential benefits.⁹³

CPCN requirements have two other rationales, which are not predicated on the conscious prevention of competition. First, some have argued that CPCN laws are simply an investigative

⁸⁸ *Id.*

⁸⁹ See generally ISRAEL M. KIRZNER, *COMPETITION AND ENTREPRENEURSHIP* (1973); Peter Boettke et al., *Saving Government Failure Theory from Itself: Recasting Political Economy from an Austrian Perspective*, 18 CONST. POL. ECON. 127 (2007).

⁹⁰ See Friedrich Hayek, *The Pretence of Knowledge*, available at http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1974/hayek-lecture.html (last visited Oct. 1, 2014).

⁹¹ See Kotaro Suzumura, *Excess Entry Theorems after 25 Years*, 63 JAPANESE ECON. REV. 152, 152 (2012).

⁹² For example, some cities, most notably New York, have capped the total number of licenses for taxicabs at an unrealistically low number. As a result, such licenses are extremely expensive: a New York taxicab medallion is now worth more than \$1 million. Only a few wealthy owners are able to afford them. See Michael M. Grynbaum, *2 Taxi Medallions Sell for \$1 Million Each*, N.Y. Times City Room, Oct. 20, 2011, available at <http://cityroom.blogs.nytimes.com/2011/10/20/2-taxi-medallions-sell-for-1-million-each/> (last visited Sept. 10, 2014).

⁹³ See Suzumura, *supra* note 91, at 168 ("[E]ven if it is theoretically true that deliberate regulation by enlightened—but less-than-perfect—government may outperform uncontrolled competitive forces, the social cost of regulation must be weighed against the social cost of competition."). See further Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 611–12 (1969) ("[T]he fear of ruinous competition seems largely groundless. . . . [T]here is now a good deal of evidence that the certificating power has been used to limit greatly the growth of competition in the regulated industries.").

tool, whereby existing firms participate as advisors to the government agency charged with policing the industry.⁹⁴ According to this theory, incumbent firms know the industry best and know the people and firms involved in that industry; they are therefore in the best position to inform public officials of who is and is not qualified to operate. But this argument overlooks the obvious conflict of interest involved in deputizing existing firms as gatekeepers empowered to decide who else may enter the market. Moreover, in many, if not most, CPCN schemes, the existing firms are not required to provide information, let alone legally admissible evidence, relating to the applicant's skills and qualifications.

A similar defense of CPCN laws is that they are meant to remedy “information asymmetry.”⁹⁵ Information asymmetry occurs when one side of a transaction lacks knowledge about the transaction, possessed by the other party, that might otherwise affect his decision to buy or sell. A common goal of government regulation is to resolve such imbalances, often through disclosure requirements or by requiring a minimum degree of knowledge and skill on the part of the practitioner; this is the *Dent* rationale for occupational licensing. In some markets, information asymmetry is a significant problem, although it is dubious whether government regulation is the solution.⁹⁶ Even if it is one solution, information asymmetry concerns are more properly addressed by rules that require certain qualifications or skill levels in order to protect less-informed consumers against possible exploitation than by laws that simply prohibit new entrants without regard to skill, as CPCN laws typically do. Information asymmetry is also far less of a concern in an industry like household goods moving than, for example, in the restaurant

⁹⁴ See, e.g., *Civil Aeronautics Bd. v. State Airlines*, 338 U.S. 572, 578 (1950) (“The prime purpose of allowing interested persons to offer evidence is to give the Board the advantage of all available information as a basis for its selection of the applicant best qualified to serve the public interest.”).

⁹⁵ See, e.g., *Bruner*, 997 F. Supp. 2d at 699.

⁹⁶ See, e.g., DANIEL F. SPULBER, *REGULATION AND MARKETS* 64 (1989).

industry or the market for legal services, since the consumer can, and usually does, research and compare moving companies before hiring one. Customers have plentiful online resources, such as Angie’s List, Yelp!, and Unpakt,⁹⁷ to help them choose a qualified and reliable company. The CPCN restriction is prima facie less adapted to resolving this concern than are ordinary types of regulation, such as qualification requirements, regular inspections, and a process for redressing consumer complaints.

Finally, and most fundamentally, CPCN laws are intended to allow regulators to control entry into a trade in order to serve predetermined goals—to “rationalize” the industry, to ensure the “health” of the industry, or to maintain “adequate service.” The assumption is that regulatory agencies can control economic behavior to accomplish certain outcomes. But this assumption ignores the spontaneous and creative nature of economic competition.⁹⁸ It is not possible for an entrepreneur to prove that her proposed business model is a good idea, or will serve economic “health,” since such a concept has no objectively measurable standards. Economic competition is a discovery process,⁹⁹ whereby proposed businesses either succeed or fail depending on countless dynamic factors. Supply and demand shift on a moment-to-moment basis. The world’s most successful and sophisticated companies find it hard enough to predict whether consumers will want some new product or service—New Coke or the Microsoft Zune are proof enough of that. It is unrealistic to expect that government regulators, with far fewer resources to do consumer research (and few ever attempt any), can determine what constitutes a “healthy industry” or what services are “adequate.” Worse, this requirement deters innovation that can create goods and services that cannot be anticipated or described beforehand. Had Starbucks

⁹⁷ See Doug Gross, *Unpakt Is “Yelp for Moving Companies,”* CNN, Sept. 3, 2014, available at <http://www.cnn.com/2014/08/18/tech/web/unpakt-moving/> (last visited Oct. 10, 2014).

⁹⁸ See generally VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES* (1998).

⁹⁹ See Friedrich Hayek, *Competition as a Discovery Procedure*, 5 Q. J. AUSTRIAN ECON. 9 (2002).

been required to prove, in 1992, that the United States “needed” a new chain of coffee shops, it could not have done so. There were millions of coffee shops in the United States at that time, and they were doubtless providing “adequate” service, whatever that means. Yet it turned out that the United States *did* “need” a new coffee chain; we know this now because Starbucks has been so successful. The only way to learn whether the country “needed” more coffee shops was to try the experiment. By forcing applicants to prove the need for a new firm *before* they try, CPCN laws do not allow entrepreneurs to try the experiment. They stifle the innovation and experimentation on which economic growth depends, and they penalize the creativity, perseverance, and courage that lie at the core of a peaceful and flourishing society.¹⁰⁰

B. The Supreme Court and the Competitor’s Veto

The Supreme Court first addressed the constitutional issues raised by CPCN laws in two cases in the 1920s, *Buck v. Kyukendall*¹⁰¹ and *Frost v. Corporation Commission*.¹⁰² Both involved Dormant Commerce Clause and Due Process challenges. In *Buck*, Washington State denied an Oregon bus line authority to transport passengers on the grounds that existing bus services were “adequate.”¹⁰³ The Supreme Court held the law invalid on the grounds that while states may adopt “appropriate . . . regulations . . . to promote safety upon the highways and conservation in their use,” they may not impose restrictions on competition *per se*. The Washington law’s “primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the

¹⁰⁰ See generally Sandefur, *Insiders, Outsiders*, *supra* note 48, at 400–8.

¹⁰¹ 267 U.S. 307 (1925).

¹⁰² 271 U.S. 583 (1926).

¹⁰³ *Buck*, 267 U.S. at 313.

same purpose and in the same manner.”¹⁰⁴ Again, in *Frost*, the Court struck down a CPCN requirement on the grounds that it was “in no real sense a regulation of the use of the public highways,” but “a regulation of the business of those who are engaged in using them,” designed “to protect the business of those who are common carriers in fact by controlling competitive conditions.”¹⁰⁵

But the Court’s most direct confrontation with CPCN laws occurred in *New State Ice Co. v. Liebmann*,¹⁰⁶ a 1932 decision involving an Oklahoma law that prohibited the opening of new ice-making or ice-delivery businesses unless the state ice commission was satisfied of the need for additional competition. When Ernest Liebmann started a new ice firm, the Commission sought to enjoin his operations, and the case ultimately arrived at the Supreme Court. While recognizing that the state could regulate businesses and require licensure for practitioners of trades, the Court found the CPCN law unconstitutionally arbitrary. Delivering ice “is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor,”¹⁰⁷ and the CPCN requirement was “no[t] differen[t] in principle . . . [from] the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed.”¹⁰⁸ The law did not protect the public against badly made ice or incompetent or dangerous delivery services. Nor did it help prevent

¹⁰⁴ *Id.* at 315–16.

¹⁰⁵ 271 U.S. at 591.

¹⁰⁶ 285 U.S. 262 (1932). *See also* *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 90–91 (1957) (“To reject a motor carrier’s application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others.”).

¹⁰⁷ *New State Ice*, 285 U.S. at 277.

¹⁰⁸ *Id.* at 278–79.

monopolization of the ice industry. Instead, the law *established* a monopoly: “The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.”¹⁰⁹

The sole dissenter in *Liebmann* was Justice Louis Brandeis, notorious for his belief in the concept of “destructive competition.”¹¹⁰ In Brandeis’s view, the Court was too stringently applying the Due Process Clause to prevent states from “experimenting” with regulations of industry.¹¹¹ Although Brandeis’s “laboratories of democracy” metaphor has become a staple of federalist rhetoric, it was the obsolete, unhealthy form of federalism that he was advocating, one in which citizens’ basic rights would be left at the mercy of state governments, and the federal guarantee of the Fourteenth Amendment left unenforced. The Court made this point when it rebutted Brandeis’s laboratory metaphor: while the *Liebmann* majority had no abstract objection to states experimenting with regulatory schemes, it observed that states cannot “experiment” in ways that violate the Constitution: “unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. . . . [I]t would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them.”¹¹² States had no more authority to “experiment” by depriving individuals of economic liberty than they had to “experiment” by censoring speech, establishing religion, or otherwise abridging constitutionally protected rights.

¹⁰⁹ *Id.* at 279.

¹¹⁰ *Id.* at 292 (Brandeis, J., dissenting). See further Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405, 443–47 (1996). As Justice Stephen Breyer has acknowledged, Brandeis’s view “that ‘destructive competition’ was a serious problem demanding a legislative solution . . . no longer reflects the consensus of modern regulatory economists, who think that ‘destructive competition’ was generally an empty pejorative phrase used by established firms in regulated industries like trucking, maritime shipping, or airlines, to stop the competition that new entrants might provide.” *Justice Brandeis as Legal Seer*, 42 BRANDEIS L.J. 711, 715 (2004).

¹¹¹ *New State Ice*, 285 U.S. at 310–11 (Brandeis, J., dissenting).

¹¹² *Id.* at 279–80.

Liebmann has never been overruled, and its basic principle—that states may not arbitrarily restrict entry into a trade simply to protect established firms against competition—remains valid, though often ignored, law. While the rational basis test is indulgent toward the purposes and means states choose in regulating industry, the law still bars states from “experimenting” in ways that violate constitutional rights, including the right to earn a living.

III. Kentucky’s Competitor’s Veto Law

Kentucky’s CPCN requirement for movers of household goods was typical of the genre.¹¹³ Under that law, a CPCN applicant was required, before filing an application, to notify existing certificate holders of his intent to file an application, either by publishing a notice in a newspaper each week for three weeks before applying or by emailing every existing CPCN holder of his intent to apply.¹¹⁴ This notice would enable any interested person to file an objection, called a “protest,” against the granting of a CPCN. (A person or company filing a protest was referred to as a “protestant.”) The court later found it significant that, although the general public could, in theory, see the newspaper notice, the email notification procedure provided in the statute only required the applicant to notify existing moving companies, not the general public.¹¹⁵

After publishing the notice, the CPCN applicant would then submit the application to the Kentucky Transportation Cabinet’s Motor Carrier Services Division, along with evidence of financial solvency.¹¹⁶ The Division would then schedule an administrative hearing to determine

¹¹³ The facts specified in this section were obtained through discovery in *Bruner v. Zawacki*, *supra* note 6. Plaintiffs limited their discovery requests in this matter to the five-year period before the filing of the complaint, in order to make discovery manageable. No evidence was uncovered to suggest that the Kentucky CPCN law was applied differently at any other period.

¹¹⁴ KY. REV. STAT. § 281.6251(1) (2012).

¹¹⁵ *See Bruner*, 997 F. Supp. 2d at 700.

¹¹⁶ KY. REV. STAT. § 281.630 (2012).

whether to grant the CPCN.¹¹⁷ If no protest was filed, the Division could cancel the hearing,¹¹⁸ but whenever a protest was filed, the hearing was mandatory, and the protestant was allowed to participate.¹¹⁹

No law or regulation specified what information a protest must contain; although the law required protestants to state the grounds for the protest, the protestant had no obligation to provide any factual information, admissible evidence, or even allegations relating to the applicant's qualifications, skills, or any other matters. Nor did the law require that protests be signed or notarized.¹²⁰

If the hearing was not canceled, the applicant was required to prove four things to be entitled to a CPCN:

- 1) that the applicant was fit, willing, and able to operate the proposed service (that is, qualified);
- 2) that "existing transportation service is inadequate";
- 3) that the proposed service "is or will be required by the present or future public convenience and necessity"; and
- 4) that the proposed operation would be "consistent with the public interest and the transportation policy declared [in the law]."¹²¹

If no protest was filed and the Division canceled the hearing, the applicant was not required to satisfy all these requirements, but was still obliged to prove to the Division "that there is a need for the service" and that the applicant "is fit, willing and able to perform this service."¹²²

¹¹⁷ KY. REV. STAT. § 281.625(1) (2012).

¹¹⁸ KY. REV. STAT. § 281.625(2) (2012).

¹¹⁹ 601 KY. ADMIN. REGS. 1:030(4), (6) (2012).

¹²⁰ See 601 KY. ADMIN. REGS. 1:030(4)(1)(d) (2012).

¹²¹ KY. REV. STAT. 281.630(1) (2012).

The statute contained no definitions section, and such crucial terms as “inadequate” were not explained in any statute, regulation, or case law.¹²³ Nor was “present or future public convenience and necessity” defined in any controlling legal authority. Although the term “public convenience and necessity” is common in utility regulation,¹²⁴ state courts had never explained how officials were to determine what *future* public needs might be, let alone how they were to predict future *convenience*.¹²⁵ Nor was it clear how, or even whether, “public convenience and necessity” differed from “the public interest.” As for the regulation under which, in the absence of a protest, the applicant had only to prove a “need” for the proposed service, the term “need” was also not defined in any statute, regulation, or case law.¹²⁶ Among other things, this lack of definition in the statute meant that applicants were left with little guidance on how they could prove “inadequacy” or “need,” and as we shall see, even extensive economic analysis was deemed insufficient. Nor was the Division shy about admitting that these terms were left

¹²² 601 KY. ADMIN. REGS. 1:031(1) (2012).

¹²³ The only effort Kentucky courts had made to define “inadequacy” was *Eck Miller Transfer Co. v. Armes*, 269 S.W.2d 287, 289 (Ky. 1954), which held that the word meant “substantial inadequacy,” and added that this “inadequacy” must be due to a deficiency that manifests “an inability or unwillingness to render adequate service.” In *Combs v. Johnson*, 331 S.W.2d 730, 733–34 (Ky. 1959), the court reiterated *Armes*’ circular definition of the term, while admitting that “[i]nadequacy and public need are relative terms.”

¹²⁴ The closest state courts had come to defining this term was *Red Star Transp. Co. v. Red Dot Coach Lines*, 295 S.W. 419, 420 (Ky. 1927), which unhelpfully stated that the phrase is “used in a relative sense. . . . If additional service is a public necessity, relief from such necessity is a convenience. Conversely, if reasonably adequate public conveniences exist, there is no necessity for relief.” This was about as satisfying as the hoary philosophy pun, memorably quoted by Homer Simpson, about the relationship of mind to substance: “What is mind? No matter. What is matter? Never mind.” “Good Night” (The Simpsons), *The Tracy Ullman Show*, Apr. 19, 1987.

¹²⁵ The phrase “present or future public convenience and necessity” does appear in the laws of some other jurisdictions, including the Interstate Commerce Act. But federal courts have often remarked on the vagueness of the term and have upheld its constitutionality only because federal regulations specify objective factors the agency must use, and standards parties must prove, in order to make valid findings. *See, e.g., Ass’n of Am. R.R.s v. I.C.C.*, 846 F.2d 1465, 1467 (D.C. Cir. 1988) (describing “public convenience and necessity” as “vague,” but noting that the ICC had promulgated regulations that guided its discretion). In *Burlington Truck Lines, Inc., v. I.C.C.*, 194 F.Supp. 31, 50 (S.D. Ill. 1961), *rev’d on other grounds*, 371 U.S. 156 (1962), the district court recognized that “[f]uture need is an uncertainty in all instances,” so that predicting “future” public convenience is a dangerously vague proposition, requiring officials to “exercise a prophetic vision.” But it ruled that the vagueness was limited by regulations that established “evidentiary guidelines” specifying objective standards that applicants had to prove to the Commission. *See also Artus Trucking Co., Inc. v. I.C.C.*, 377 F. Supp. 1224, 1230–31 (E.D.N.Y. 1974) (citing John Novak Contract Carrier Application, 103 M.C.C. 555, 557 (1967)). Kentucky had promulgated no such regulations.

¹²⁶ The Division would typically require in such instances that the applicant submit affidavits from four witnesses testifying to the existence of a “need,” but no statute, regulation, or case law provided for this.

undefined. The Kentucky Transportation Cabinet admitted in discovery that there were “no independent standard[s] or document[s] or list of factors or statistics” on which it relied when assessing “adequacy.”¹²⁷

Even aside from the risk of being denied a license, the hearing requirement was a substantial barrier to entry for entrepreneurs. Like many states, Kentucky requires any business organized as a corporation to be represented by an attorney at an administrative hearing—the corporation’s officers or owners are not allowed to represent the corporation.¹²⁸ But hiring a lawyer is expensive, and the delay imposed by the hearing requirement was also substantial: on average, a protested applicant who participated in a hearing could expect to wait some eight months for a hearing, and more than two months for a decision after that.¹²⁹

Public choice theory would predict that if a law empowers incumbent moving companies to bar new firms from obtaining licenses, or at least to delay and burden their efforts to do so, the incumbent firms will exploit this advantage when doing so is profitable. Incumbent firms are particularly likely to do this where, as here, the cost of filing a protest is so small, and the burden it imposes on rival firms is so severe. If investment in rent-seeking activity is proportional to the expected net return to the rent-seeking firm, a process that gives each existing firm the power to impose a potentially crushing burden on potential rivals at little cost to itself is likely to attract more self-interested activity than a process that requires, for example, that any potential protest identify specific facts about the applicant’s skills, or that such a protest be signed under penalty of perjury.

¹²⁷ Deposition of Jesse Rowe, *Bruner v. Zawacki* (No. 3:12-cv-00057-DCR), at 18 (on file with author).

¹²⁸ *Ky. State Bar Ass’n v. Henry Vogt Machine Co., Inc.*, 416 S.W.2d 727 (Ky. 1967).

¹²⁹ There was no statutory deadline, but in the case of Michael Ball, *Ky. Transp. Cabinet Docket No. 12-091*, the application was filed September 25, 2012, the hearing was held January 23, 2013, and the decision was rendered February 19, 2013. In the case of Larry Coyle, *Ky. Transp. Cabinet Docket No. 10-022*, the application was filed October 24, 2009, the hearing was held September 23, 2010, and the decision rendered January 24, 2010. In the case of Margaret’s Moving, *Ky. Transp. Cabinet Docket No. 08-135*, the application was filed June 24, 2008, the hearing was held May 18, 2009, and the decision was rendered September 22, 2009.

Considering the effectiveness of CPCN laws as barriers to entry, Judge Richard Posner has written that such laws “may perpetuate monopoly.” If a firm wishes to enter the market, it must persuade a government agency to allow it to do so, which “will require a formal submission, substantial legal and related expenses, and a delay often of years—all before the firm may commence operations. The costs and delay are alone enough to discourage many a prospective entrant. Much more is involved than running a procedural gauntlet, however, for ultimate success is by no means certain. The favor with which regulatory agencies look upon entry varies with the agency and the period, but the predominant inclination has been negative.”¹³⁰ Thus, CPCN laws limit “greatly the growth of competition in the regulated industries.”¹³¹

Kentucky’s CPCN law for moving companies proved these predictions with striking clarity. From January 1, 2007, through August 21, 2012,¹³² 39 applicants sought permission to operate a moving company in Kentucky. Nineteen of these applications were protested by one or more existing moving firms, for a total of 114 protests filed during that five-year period, all of which were filed by existing moving companies.¹³³ Although any member of the general public could legally file a protest, none ever had. Of course, as the statute did not require that the general public be notified of individual CPCN applications (or of the licensing process generally), they likely were unaware of them.¹³⁴ Contrary to the government’s claim that the protest procedure helped provide licensing officials with information about an applicant’s skills

¹³⁰ Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 612 n.125 (1969).

¹³¹ *Id.*

¹³² Plaintiffs sought discovery regarding applications in the five years before the filing of the complaint—that is, between January 1, 2007, and August 21, 2012. Five years was chosen just to ensure the manageability of discovery. There is no reason to suspect that the statute operated any differently at any other time. *See Bruner*, 997 F. Supp. 2d at 694 n.2.

¹³³ Notably, almost every protest was also filed by the same attorney.

¹³⁴ *See supra*, text accompanying note 115.

and qualifications, the Division never investigated any allegations contained in any protests, nor did it examine protests to ensure that they met any standards of proof. Further, there was no information in these protests that would be helpful, even if the Division had investigated. No protest alleged any danger to the public if the application were granted, or suggested that the applicant was incompetent or unqualified. On the contrary, every protest stated as the grounds for objection that a new moving firm would be “directly competitive with . . . these protestants and [would] result in a diminution of protestant’s revenues.”¹³⁵ Yet the Division never rejected a protest as inadmissible or incomplete in that 2007–2012 period,¹³⁶ strongly undermining the “investigative tool” rationale for the CPCN requirement.

Of the 19 firms whose CPCN applications were protested, 15 abandoned their applications rather than proceed through the hearing process.¹³⁷ This outcome is not surprising, because during this period, the Kentucky Transportation Cabinet rejected *all* protested applications, and it did so solely on the grounds that existing moving services were “adequate”; no application was denied due to public safety concerns.¹³⁸

¹³⁵ See, e.g., protest, In re. Application of BAMN Enterprises, LLC, Ky. Transp. Docket No. 08-135 (July 11, 2008) at 2 (on file with author).

¹³⁶ Rowe Deposition, *supra* note 127 at 26.

¹³⁷ A similar pattern was observed under Missouri’s CPCN law. See Sandefur, *A Public Convenience*, *supra* note 7 at 176–86. But the Missouri statute allowed an applicant to specify a geographical radius of operations. Thus, applicants could restrict their area of operation in order to avoid competing with existing firms. As a result, during a five-year period, 76 applications for moving company CPCNs were filed, 17 of which sought authority to operate statewide. All these applicants were subjected to one or more protests, called “interventions,” for a total of 106 interventions. The other 59 applicants sought to operate within a “commercial zone” (which was statutorily exempt from the intervention rule) or within a small or isolated geographical area, where they minimized competition against existing firms. Still, all 106 objections were filed by existing moving companies; none alleged any facts relating to the applicant’s qualifications or honesty. In 14 of the 17 contested cases, applicants either abandoned their applications upon the filing of an intervention or amended their applications to request authority to operate in a commercial zone or in a smaller area. Such amendments always resulted in the intervenors withdrawing their objections. In the two cases in which applicants proceeded through the hearing process, one was granted approval on the grounds that competition is beneficial to the public, and the other was denied on the grounds that competition was undesirable. When that applicant later sought a CPCN to operate within a smaller geographic radius, the CPCN was granted. In no case during the five years did public safety or honesty considerations play a role in the process.

¹³⁸ Margaret’s Moving, which was deemed unfit because it had operated illegally before applying for a CPCN, could be considered an exception, but the Division later reversed this determination. See *infra*, text accompanying notes 153–59.

Contrast this outcome with the treatment of applicants who sought only permission to purchase an existing CPCN from another company. Because this route would not increase the competitive pressures that incumbent firms faced, those firms had less incentive to bar these “transfer applications.” Public choice theory would therefore predict that existing firms would be less inclined to protest transfer applicants than applicants for new CPCNs. That was, in fact, what occurred. From 2007 through 2012, 15 transfer applications were filed,¹³⁹ none was protested, nor were any denied. On the contrary, many applicants who sought new CPCNs and were protested then abandoned those applications, only to turn around and file a transfer application instead, which was not protested. On at least three such occasions, the applicants who gave up seeking a new CPCN and chose to buy one from an existing firm instead bought one from a firm that had protested the application for a new certificate. For example, when Little Guys Movers applied for a new certificate in March 2012, eight existing firms protested, including Affordable Moving, Inc. Little Guys withdrew its application, and five months later, it filed a transfer application to buy a CPCN. That application was not protested and was approved a month later; the firm that sold Little Guys a CPCN was Affordable Moving, Inc.¹⁴⁰ This example is further evidence that existing firms used the protest procedure solely for the self-interested purpose of vetoing potential competition, since public safety concerns would not suddenly vanish because the applicant purchased a certificate from an existing firm instead of requesting a new one.

¹³⁹ See Defendants’ Response to Plaintiffs’ Interrogatories, Set One, Bruner v. Zawacki, No. 3:12-CV-00057-DCR (Apr. 1, 2013) at 19–20 (on file with author).

¹⁴⁰ Report and Recommended Order Granting Authority, In re. Application of Little Guys Movers, Inc., Ky. Transp. Cabinet Docket No. 12-061 (Oct. 19, 2012) (on file with author). The same occurred in the cases of Big O Movers—which applied for a new certificate on January 28, 2011, suffered two protests, withdrew its application, and then successfully applied for permission to buy a CPCN from Rivertown Moving & Storage, which had protested Big O’s initial application, see Ky. Transp. Docket Nos. 11-016, 12-019 (on file with author)—and Margaret’s Moving, which is discussed *infra*, text accompanying notes 153–59.

The experiences of applicants who went through the hearing process are also telling. One applicant, Michael Ball, had been in the moving business for 35 years when he decided to apply for a CPCN in his own name.¹⁴¹ Six existing firms filed protests,¹⁴² none of which identified any public safety concerns or fears about Ball’s qualifications or honesty. Instead, all complained that Ball’s company would be “directly competitive with” their own operations and “result in a diminution of [their] revenues.”¹⁴³ At the hearing, no testimony or other evidence was heard that suggested that Ball was unqualified, or that his operation would endanger public health, public safety, the environment, or public infrastructure.¹⁴⁴ In fact, one protestant testified that he believed Ball “would be [a] great [mover].”¹⁴⁵

The hearing officer agreed. In an order dated February 19, 2013, he concluded that Ball was fully qualified and thus met the “fit, willing, and able” requirement under the law.¹⁴⁶ Nevertheless, he rejected Ball’s application on the grounds that Ball had “not prove[d] that the existing household goods moving service in Louisville is inadequate and that his proposed service is needed.”¹⁴⁷ Thus, notwithstanding Ball’s extensive experience and training, he was prohibited from operating his own firm solely because existing firms considered the increased competition undesirable.

Another notable feature of Ball’s application was that it demonstrated the almost infinite malleability of the “inadequacy” standard. Although Kentucky courts had never defined

¹⁴¹ In re. Application of Michael Ball, Ky. Transp. Cabinet Docket No. 12-091.

¹⁴² See Notice of Protest, In re. Application of Michael Ball, Ky. Transp. Cabinet Docket No. 12-091 (Oct. 12, 2012) (on file with author).

¹⁴³ *Id.*

¹⁴⁴ See Transcript of Hearing, Application of Michael Ball, Ky. Transp. Cabinet Docket No. 12-091 (Jan. 23, 2013) (on file with author).

¹⁴⁵ *Id.* at 46.

¹⁴⁶ Report and Recommended Order Denying Application, In re. Application of Michael Ball, Ky. Transp. Cabinet Docket No. 12-091, on file with author.

¹⁴⁷ *Id.* at 9.

“inadequacy,” they had held that the public’s desire for better or more convenient service was not enough to prove inadequacy.¹⁴⁸ Nor was “proof of some instances of unsatisfactory service.”¹⁴⁹ In one case, the Kentucky Court of Appeals found that the testimony of five witnesses that existing shippers were inadequate was still not sufficient, because their testimony only represented “a few isolated instances of unsatisfactory service.”¹⁵⁰ Indeed, even if an applicant did prove that existing moving services were inadequate, the application could still be rejected on the grounds that the existing services might *become* adequate in the future.¹⁵¹ But it is hard to imagine how one might measure whether existing movers could *become* adequate. This vagueness reinforced the statute’s cartel characteristics. In Ball’s case, the protestant who admitted that her firm could not always meet customer demand testified, “I have [two] brothers in the moving business. So I would call one of their companies [to help out] first.”¹⁵² Thus, the statute perpetuated family oligopoly by encouraging existing firms to toss business to relatives instead of allowing new competition.

Another protested applicant, Larry Coyle, tried at his hearing to prove that existing moving services were inadequate by presenting testimony from a professional economist about the market for moving services in Berea County, where Coyle hoped to locate his business.¹⁵³ The economist testified that the county’s population had increased dramatically in the previous decade, and now constituted a trade area of about 145,000 people, but was served by only a single moving company.¹⁵⁴ The effort was fruitless, thanks to the flexibility of the “inadequacy”

¹⁴⁸ Combs, 331 S.W.2d at 733.

¹⁴⁹ *Id.* at 734.

¹⁵⁰ Jones v. Webb Transfer Line, Inc., 328 S.W.2d 407, 411 (Ky. 1959).

¹⁵¹ See Combs, 331 S.W.2d at 733.

¹⁵² Transcript of Hearing, In re. Michael Ball, *supra* note 144, at 36.

¹⁵³ See Transcript of Hearing, In re. Application of Larry Coyle Application, Ky. Transp. Cabinet Docket No. 10-022 (Sept. 23, 2010), at 3–25 (on file with author).

¹⁵⁴ *Id.* at 9.

test. The hearing officer concluded that the existing company “testified to a significant decline in demand,” so that allowing a new company to compete would be “unfair and destructive” to existing firms.¹⁵⁵ Although the hearing officer again found that Coyle was fully qualified, he was denied a license on the grounds that existing moving services were sufficient.

The experience of the third applicant who went through a hearing is even more revealing. That case involved Margaret’s Moving & Storage, which applied for a CPCN in September 2008, only to be protested by eight existing movers.¹⁵⁶ Again, none identified any danger to the public or claimed that Margaret’s service was unqualified or dishonest—indeed, one acknowledged that he “did not complain about [Margaret’s] quality of work or ability to do [its] job.”¹⁵⁷ Instead, all protested solely on the basis that existing moving services were adequate. At the hearing in May 2009, one protestant, the owner of Arrow Moving and Storage, testified that the reason he protested was that “customers [had] call[ed] him and [told] him that they were going to move with Arrow, but they decided to move with applicant/Margaret’s Movers because [Margaret’s] was cheaper.”¹⁵⁸

The Margaret’s Moving & Storage application was complicated by the fact that Margaret’s had been operating illegally, without a license, for several months before applying for a CPCN. Thus, when the Division rejected Margaret’s application, it did so for two reasons: first, because existing moving services were adequate, and second, because by operating illegally, Margaret’s had proven that it was not “fit, willing, and able” to operate in compliance with the law.¹⁵⁹

¹⁵⁵ Recommended Decision and Order, In re. Application of Larry Coyle, Ky. Transp. Cabinet Docket No. 10-022 (Dec. 18, 2010), at 6.

¹⁵⁶ Protest, In re. Application of BAMN, LLC, Ky. Transp. Cabinet Docket No. 08-135 (July 11, 2008) (on file with author).

¹⁵⁷ See Report and Recommended Order, In re. Application of BAMN Enterprises, LLC, Ky. Transp. Cabinet Docket No. 08-135 (Sept. 22, 2009), at 12 (on file with author).

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 15.

But after Margaret's application was denied, its owner sued the Kentucky Transportation Cabinet, arguing that the rejection was proof of racial discrimination.¹⁶⁰ That case was swiftly settled out of court, with one condition of settlement being that Margaret's would be allowed to purchase a CPCN from an existing firm. In November 2009, Margaret's filed a transfer application, which received no protests, and the Division granted permission in a decision that made no mention of the prior illegal operations that only a year earlier had been grounds for finding that Margaret's Moving & Storage failed the "fit, willing, and able" test. In fact, not only did the Division now find that Margaret's *was* "fit, willing, and able," but the hearing officer commented favorably on the owner's long experience in the moving industry.¹⁶¹ Margaret's purchased its CPCN from J. D. Taylor, one of the companies that had protested its 2008 application for a new CPCN.¹⁶²

A final piece of evidence that helps dramatize the rent-seeking process that Kentucky's CPCN law put into place comes from the treatment of an applicant who took an aggressive approach during the application process. In 2012, a business called MJ, LLC, applied for a CPCN and was protested by seven existing firms. As usual, the firms did not claim that MJ was unqualified, but based their protests on the fact that MJ's business would "directly compet[e] with . . . these protestants and [would] result in a diminution of protestants' revenues."¹⁶³ The Division scheduled a hearing, but in the months leading up to the hearing, MJ's attorney served the protestants with formal discovery requests, demanding answers to a variety of questions.

¹⁶⁰ Rowe Deposition, *supra* note 127, at 53.

¹⁶¹ Report and Recommended Order on Motor Carrier Application, In re. Application of BAMN Enterprises, Inc., Ky. Transp. Docket No. 09-163 (July 27, 2010) (on file with author).

¹⁶² See Final Order Granting Authority on Motor Carrier Application, In re. Application of BAMN Enterprises, LLC, Ky. Transp. Cabinet No. 09-163 (Aug. 12, 2010) (on file with author).

¹⁶³ Protest, In re. Application of MJ, LLC, Ky. Transp. Cabinet Docket No. 12-081 (Sept. 27, 2012), at 2 (on file with author).

Weeks later, three firms withdrew their protests rather than answer.¹⁶⁴ A fourth firm, which did answer the questions, admitted in an interrogatory response that it “would have no interest in protesting any application which was not requesting a certificate for household goods authority with a [base of operations] in Lexington or a nearby city.”¹⁶⁵ And when MJ persisted with follow-up interrogatories, two more firms withdrew their protests the following week.¹⁶⁶ The Kentucky federal district court struck down the Competitor’s Veto law before MJ’s application proceeded further, but this behavior again supports the conclusion that protestants used the notice-and-hearing process not to protect consumers or to prevent dangerous or dishonest moving companies from entering the market, but simply to prevent competition.

A. The Bruner Case

In 2010, shortly after earning his master of business administration from the University of Kentucky, Raleigh Bruner decided to start a moving company, which he named after the university’s basketball team, the Wildcats. Within a year, Wildcat Moving was employing 31 people, many of them University students, and operating a fleet of five trucks. Then on May 21, 2011, state officials sent Bruner a letter informing him that he had failed to obtain a CPCN and that Wildcat Moving was operating illegally.

Represented by attorneys with the Pacific Legal Foundation, Bruner sued, arguing that the CPCN law violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It was not rationally related to protecting the public, but served only to protect

¹⁶⁴ Notice of Withdrawal of Protests, In re. Application of MJ, LLC, Ky. Transp. Docket No. 12-081, Feb. 19, 2013 (on file with author).

¹⁶⁵ Protestants’ Response to Applicant’s First Set of Interrogatories and Requests for Production of Documents, In re. Application of MJ, LLC, Ky. Transp. Cabinet Docket No. 12-081 (Mar. 1, 2013), at 3.

¹⁶⁶ Notice of Withdrawal of Protests, In re. Application of MJ, LLC, Ky. Transp. Docket No. 12-081, Apr. 18, 2013 (on file with author).

existing firms against legitimate competition from new companies, which, as the Sixth Circuit has held, is not a legitimate government interest.¹⁶⁷ After hearing the evidence presented here, the court ruled that the Kentucky CPCN “acts as a ‘competitor’s veto’” that bars people from entering the moving trade for reasons unrelated to the person’s skills or qualifications.¹⁶⁸

Kentucky officials offered three justifications for the CPCN requirement. First, they claimed that the requirement helped ensure that moving companies did not damage property. Second, they argued that the requirement helped them to obtain information about an applicant’s skills and qualifications—the “investigative tool” theory. Third, they argued that the CPCN requirement resolved the problems of “information asymmetry” and “excess entry” into the moving industry.¹⁶⁹ The court found these arguments baseless.

The requirement that prospective movers notify existing firms of their intent to apply for a CPCN and allow those firms to trigger the expensive and time-consuming hearing procedure did nothing to prevent property damage: existing laws already made property damage illegal. Moreover, experienced, skilled movers who were unlikely to damage property, such as Michael Ball, could be, and often were, denied CPCNs without regard to their qualifications.¹⁷⁰ Nor did the Competitor’s Veto process decrease administrative costs, because “when a protest is filed, the Cabinet *must* hold a hearing,” which increases costs.¹⁷¹ And because the history of enforcement demonstrated that “the result [of a hearing] is pre-determined,” the whole process merely wasted resources “in a futile administrative exercise.”¹⁷²

¹⁶⁷ *Craigmiles*, 312 F.3d at 224.

¹⁶⁸ *Bruner*, 997 F. Supp. 2d at 697.

¹⁶⁹ *Id.* at 699.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

As to the state’s argument that the Competitor’s Veto was designed to remedy “information asymmetry” and “excess entry,” the procedure had no realistic connection to these concerns. Aside from the question of whether information asymmetry is a significant concern in the moving industry, the Competitor’s Veto process did not address the problem, because it did not require applicants to disclose any information about qualifications—the separate “fit, willing, and able” portion of the statute already did that—and any such information that was discovered was not disclosed to the general public. Nor were applicants required to notify the public of their intent to seek a CPCN.¹⁷³ And, as we have seen, protestants were not required to provide information relevant to protecting consumers, nor did they ever do so. The court thus had little trouble rejecting the information asymmetry rationale. “[T]he only ‘information’ supplied to new applicants is that no new competition is wanted.”¹⁷⁴

The theory of “excess entry” fared no better. Assuming that this theory had any applicability to the moving industry, there was no evidence that such considerations played any role in the process of granting or withholding a license. The Division engaged in no serious consideration of consumer welfare or market research, but instead allowed existing firms to “essentially ‘veto’ competitors” for reasons “completely unrelated to . . . societal costs.”¹⁷⁵ Officials charged with enforcing the law “testified that they had never heard of the phrase ‘excess entry,’”¹⁷⁶ and the fact that many moving companies operated successfully for years without getting a CPCN proved that there was unmet market demand for new moving services, regardless of any assessment of the “adequacy” of existing services. Thus, the court concluded, “[t]o the extent that the protest and hearing procedure prevents excess entry into the moving

¹⁷³ *Id.* at 700.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

business, it does so solely by protecting existing moving companies—regardless of their quality of service—against potential competition.”¹⁷⁷ Having dispensed with these rationales for the Competitor’s Veto procedure, the court concluded that it served only the unconstitutional goal of economic protectionism.¹⁷⁸

Still, the court limited its decision. First, it did not find the statute facially unconstitutional, only unconstitutional in its application. Second, it limited its decision to the moving industry.¹⁷⁹ Third, the court left in place the statute’s “fit, willing, and able” provision, which Bruner had not challenged, and which ensured that applicants for CPCNs were qualified, skilled, properly insured, and would operate legally. Finally, the court rejected Bruner’s argument that the statutes and regulations were unconstitutionally vague. This last outcome was troubling, because the court gave no explanation for its holding except the assertion that “[t]he Kentucky Supreme Court and the applicable regulations have defined the terms ‘inadequate’ and ‘present or future public convenience and necessity.’”¹⁸⁰ As we have seen, this statement is not true. Although the court cited two state precedents to support this proposition, neither defines the terms in the statute.¹⁸¹ And given that officials had testified that they “[did not] have any standards”¹⁸² for determining the “inadequacy” of existing services, the “need” for new services, or “future public convenience” in the moving industry, it is hard to understand why the court found these statutory terms sufficiently clear. In fact, the CPCN requirement is better described

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 701.

¹⁷⁹ *Id.* at 697 n.9.

¹⁸⁰ *Id.* at 701.

¹⁸¹ The court cited *Eck Miller*, 269 S.W.2d at 289, which defined “inadequacy” as “substantial inadequacy” resulting from “an inability or unwillingness to render adequate service” (*see supra* note 123), and *Germann Bros. Motor Transp. v. Flora*, 323 S.W.2d 570, 571 (Ky. 1959), which described *Eck Miller* as holding that “a new carrier . . . must offer some proof of the inability of the existing carriers to render the service required and must make a real showing of a substantial inadequacy of the existing service.” These are not definitions.

¹⁸² Rowe Deposition, *supra* note 127 at 16.

by a line from *Yick Wo v. Hopkins*: the power the statute gave to the Division “is not confined to their discretion but . . . to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.”¹⁸³

Be that as it may, the ruling in favor of Bruner marked a major victory for entrepreneurs in the Bluegrass State. Within a few months, Bruner had been granted not just one CPCN, but three, to operate several new moving companies throughout Kentucky.¹⁸⁴ Soon after the case was decided, the state enacted new legislation repealing the Competitor’s Veto requirement for moving companies,¹⁸⁵ and state transportation officials later announced that because they saw no distinction between the Competitor’s Veto law in the moving industry and in other industries, they would therefore apply the *Bruner* decision to all transportation industries.¹⁸⁶ In other words, to operate any transportation firm in the state, an individual need only be qualified and abide by public safety laws.¹⁸⁷ (Unsurprisingly, existing taxi companies immediately challenged this determination in court.¹⁸⁸)

It is too early to report on the consequences of eliminating Kentucky’s Competitor’s Veto law, but evidence from Missouri suggests that it will lead to a flourishing of new businesses as the barrier to entry collapses under the pressure of supply to meet consumer demand.¹⁸⁹ As the

¹⁸³ 118 U.S. at 366–37.

¹⁸⁴ In re. Application of Big Blue Moving, Ky. Transp. Cabinet Docket No. 14-068, In re. Application of Cardinal Moving, Ky. Transp. Cabinet Docket No. 14-065, In re. Application of Wildcat Moving, Ky. Transp. Cabinet Docket No. 14-063 (on file with author).

¹⁸⁵ See S.B. 23 (signed Apr. 2, 2014).

¹⁸⁶ See, e.g., Amended Notice of Administrative Hearing, In re. Application of Cook & Reeves Wheelchair Transportation Co., Ky. Transp. Cabinet Docket No. 14-073 (Aug. 18, 2014).

¹⁸⁷ This decision was quickly appealed by taxicab companies, and that appeal is currently pending.

¹⁸⁸ See *Yellow Cab Company of Louisville, Inc., v. Cook & Reeves Wheelchair Transp. Inc.*, Franklin Cir. Ct. Civil Action No. 14-CI-1143 (filed Oct. 10, 2014) (pending).

¹⁸⁹ A year after Missouri replaced its anti-competitive CPCN requirement for moving companies with a rule allowing any qualified mover to enter the market, the state Transportation Department reported that the wait time for moving companies seeking CPCNs had dropped from 154 days to 19 days. Sandefur, *A Public Convenience*, *supra* note 7, at 186.

court noted, the fact that moving companies were able to operate illegally for long periods without obtaining a license demonstrates an unmet need for new moving services in the state.

B. The Struggle Continues

Though gratifying, the result in *Bruner* is unusual. Far more often, judges sacrifice entrepreneurs' rights under the rational basis test, on the dubious theory that people deprived of economic liberty can and should obtain relief from the legislature instead of the courts. As Robert McCloskey wrote, this notion is at best an "amiable fiction":¹⁹⁰ unknown small business owners rarely have the political resources to get CPCN laws or other restrictions on their economic liberty eliminated.

Consider the case of Maurice Underwood, a Reno entrepreneur who tried to start a moving company in his home state in 2011. Nevada's licensing restrictions for moving companies are probably the most anticompetitive in the country. The state requires any CPCN applicant to prove to the Nevada Transportation Authority that, among other things,

- "the operation of, and the provision of such services by, the applicant . . . will *foster sound economic conditions* within the applicable industry";
- "[t]he granting of the certificate . . . will not unreasonably and *adversely affect other carriers* operating in the territory";
- "[t]he proposed operation . . . will *benefit and protect . . . the motor carrier business* in this State";

¹⁹⁰ Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50.

- “the potential creation of competition in a territory which may be caused by the granting of the certificate . . . will [not] unreasonably and *adversely affect other carriers* operating in the territory”;¹⁹¹ and
- the new business will not “create competition that may be *detrimental to . . . the motor carrier business* within this State.”¹⁹²

Note the extreme vagueness of these standards. Asked at a legislative hearing to define “sound economic conditions,” the Chief Executive Officer of the Nevada Transportation Authority testified, “It is what it is . . . you know it when you see it.”¹⁹³

The statute gives existing moving companies the privilege of filing an objection (called a “petition to intervene”) to any application for a CPCN,¹⁹⁴ and, as in Kentucky, they are not required to allege that the applicant is a danger to the public. All applicants are required to participate in a hearing, whether or not such a petition is filed, and are required to prove these and other factors to obtain a CPCN.

Underwood did not know about this law when he started his company, Man With Van Moving. But he was soon cited and fined for operating without a certificate. Being a small business owner with little capital and no staff, it is unsurprising that he was intimidated at the prospect of attending a hearing and proving that a new business would not be detrimental to existing moving companies. He filed suit in 2013, challenging the law’s constitutionality, but the district court dismissed his case.¹⁹⁵ The notion that Underwood, an unknown entrepreneur with

¹⁹¹ NEV. REV. STAT. § 706.391 (emphasis added).

¹⁹² NEV. REV. STAT. § 706.151(1)(e) (emphasis added).

¹⁹³ Testimony of Andrew Mackay before the Nevada Senate Transportation Committee, Apr. 10, 2013, http://nvleg.granicus.com/MediaPlayer.php?publish_id=468f1141-f369-1030-bce9-7f882e4cf4e2 at 1:47:29; *see also* 1:45:41 (stating that Mackay regarded his testimony as “effectively under oath.”).

¹⁹⁴ NEV. ADMIN. CODE § 706.3966.

¹⁹⁵ *Underwood v. Mackay*, 3:12-CV-00533-MMD, 2103 WL 3270564 (D. Nev. June 26, 2013). This case is currently on appeal.

little capital and no political influence—not even any customers, yet—could persuade the state legislature to repeal its anticompetitive licensing law is unrealistic. Nor should he be required to try, since his right to economic liberty is among the freedoms protected by the federal Constitution.

IV. The Need for Federal Legislation

CPCN laws have no legitimate role in ordinary competitive industries such as taxi service or household goods moving. They restrict the supply of needed services; they raise prices for consumers, and—worst of all—they restrict economic opportunity. They damage our social values of independence and entrepreneurship.¹⁹⁶

Licensing laws are today so prevalent that almost 30 percent of the workforce must get some form of government permission before practicing a trade or profession.¹⁹⁷ These workers range from medical doctors and lawyers to hair braiders,¹⁹⁸ florists,¹⁹⁹ and people who install spikes on buildings to keep birds from roosting there.²⁰⁰ In Nebraska, it is illegal to massage a horse without becoming a licensed veterinarian²⁰¹ or publish advertisements about homes for sale without becoming a licensed real estate broker.²⁰²

¹⁹⁶ See generally Sandefur, *Insiders, Outsiders*, *supra* note 48.

¹⁹⁷ Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, NBER Working Paper No. 14308 (Sept. 2008).

¹⁹⁸ See, e.g., *Bah v. Attorney Gen. of Tennessee*, 13-2789-STA-DKV, 2014 WL 2589424 (W.D. Tenn. June 10, 2014).

¹⁹⁹ See *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006).

²⁰⁰ See *Merrifield v. Lockyer*, 388 F. Supp. 2d 1051 (N.D. Cal. 2005), *rev'd*, 547 F.3d 978 (9th Cir. 2008).

²⁰¹ See Memorandum from Becky Wisell, Neb. Dep't of Health & Hum. Servs. to Chiropractors, et al., June 15, 2007, avail. at http://dhhs.ne.gov/publichealth/Documents/Animal_Therapy_%20Notice.pdf (last visited Oct. 1, 2014).

²⁰² See *Young v. Heineman*, No. 4:10CV3147 (D. Neb., pending). Nebraska law provides that a property owner may advertise his own property for sale by owner, or may advertise any property for sale by owner so long as he receives no compensation for doing so. Other parties are also exempt from the prohibition. NEB. REV. STAT. §§ 81-885.04, 81-885.01(2).

These and other examples have been discussed at length elsewhere.²⁰³ Together, they demonstrate that the right to engage in an ordinary trade to earn a living—a right long regarded as central to the protections of the common law and American citizenship—is today routinely violated or ignored by state laws that divide up markets to benefit established insiders.²⁰⁴ The rational basis scheme under which courts have operated since the New Deal renders it extremely difficult for entrepreneurs to vindicate their right to economic liberty in court, even against the most extreme violations.²⁰⁵ In short, the right to earn a living is America’s most neglected civil right. Although the CPCN laws described here do not by themselves prove the need for federal reform, the repeated and systematic violations of economic liberty through licensing laws and similar restrictions reveal a serious need for effective federal protections from state abuse.

In this section, I propose three possible federal reforms: civil rights legislation, laws enacted under Congress’s spending clause powers that would mirror the federal Religious Freedom Restoration Act (RFRA), and reform of antitrust immunity doctrines to arm entrepreneurs to defend themselves against abusive state licensing agencies. I then briefly address some of the federalism arguments typically heard in opposition to such proposals. But

²⁰³ See generally SANDEFUR, RIGHT TO EARN A LIVING, *supra* note 8; CLARK NEILY, TERMS OF ENGAGEMENT (2013); CLINT BOLICK, LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY (2004).

²⁰⁴ Legal scholars across the political spectrum have recognized this problem. New Dealer Walter Gellhorn wrote a famous law review article on this problem: *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976). His intellectual ally, progressive Robert McCloskey, acknowledged that rational basis review was based on an “amiable fiction” that entrepreneurs need little judicial protection. *Economic Due Process and the Supreme Court: An Exhumation And Reburial*, 1962 SUP. CT. REV. 34, 50. Liberal Justice John Paul Stevens observed in his dissent in *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984), that “private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest.” Contemporary liberal scholars, including Laurence Tribe and Walter Dellinger, have acknowledged that economic liberty is a critical constitutional freedom that is too often violated. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1374 (2d ed. 1988); Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2004 CATO SUP. CT. REV. 9. Ironically, conservatives are at least as likely to oppose judicial enforcement of economic freedom as they are to support it, given their commitment to “judicial restraint,” which was originally a Progressive conception. See SANDEFUR, CONSCIENCE OF THE CONSTITUTION, *supra* note 36 at 121–36.

²⁰⁵ See generally SANDEFUR, RIGHT TO EARN A LIVING, *supra* note 8, at ch. 6; Neily, *No Such Thing*, *supra* note 31.

before getting into these points, it is worth examining reforms of federal CPCN laws that took place 35 years ago. During the 1980s, the federal government abolished or diluted CPCN requirements in the transportation and health care industries. The result was an influx of new firms, with resulting increases in supply and innovation and decreases in cost.

A. Reduction of CPCN Barriers in the 1980s

Federal law imposed a CPCN requirement on railroads in 1920, followed by airlines, and, later, interstate transportation companies using automobiles.²⁰⁶ The Motor Carrier Act of 1935²⁰⁷ defined interstate trucking and bus operations as common carriers and imposed a CPCN requirement premised on the theory of destructive competition: the law would prevent the perceived danger of “oversupply,” would restrict “cream-skimming,” and would increase the enforcement powers of federal regulatory agencies.²⁰⁸

That Act did not explicitly enable existing CPCN holders to protest or to prevent applicants from obtaining certificates,²⁰⁹ but the Transportation Act of 1940²¹⁰ and regulations by the Interstate Commerce Commission (ICC) enabled “interested parties” to protest an application and to participate in any ICC hearing regarding the application.²¹¹ These statutes were explicitly protectionist. They reflected the thinking of the time: much New Deal-era economic legislation was devoted to establishing cartels and enabling existing firms to write industry-wide “codes of

²⁰⁶ Melvin F. Fincke, *Is Competition Between Carriers to Be Considered by the Interstate Commerce Commission When Granting Certificates of Convenience and Necessity?*, 25 TEX. L. REV. 406, 406–7 (1947).

²⁰⁷ 49 Stat. 543 (1935).

²⁰⁸ Charles A. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 95–98 (1976).

²⁰⁹ The Act did require applicants to notify whatever other parties as the Interstate Commerce Commission deemed appropriate of the filing of the application, but did not explicitly provide that existing carriers could file a protest. *See* 49 Stat. at 551, 553.

²¹⁰ 54 Stat 898 (1940).

²¹¹ Paul Stephen Dempsey, *Entry Control under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 WAKE FOREST L. REV. 729, 736–37 (1977).

fair competition.”²¹² Like the National Industrial Recovery Act, the Motor Carrier Act and the Transportation Act were designed to prevent new entrants and to ensure “cooperation” among existing firms, based on the theory that free competition disrupted the industry and harmed the consumer.²¹³ These statutes all shifted the focus of economic policy away from consumer welfare and toward protecting the market position of existing firms.²¹⁴

For almost the next four decades, federal transportation policy was inherently anticompetitive, and the ICC frequently denied certificates to would-be interstate transportation companies on the grounds that the applicants would compete against existing firms.²¹⁵ Given these statutes’ vague phrasing, it was not difficult for existing firms to couch their self-interested monopolistic behavior in the language of public benefit and thus escape market pressures that would otherwise have led them to improve services or cut costs. This statutory vagueness also allowed regulators to recite language of allegiance toward competition and economic efficiency, and even to haphazardly permit occasional new firms to enter the market, while still enforcing powerful barriers to entry in practice.²¹⁶ In fact, before

²¹² See generally AMITY SHLAES, *THE FORGOTTEN MAN* ch. 8 (2007); BURTON FULSOM, *NEW DEAL OR RAW DEAL?* ch. 4 (2008); J. A. C. Grant, *The Gild Returns to America*, I, 4 J. POL. 303 (1942); James C. Miller III, et al., *Industrial Policy: Reindustrialization Through Competition or Coordinated Action?*, 2 YALE J. ON REG. 1, 16–20 (1984); RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 63–66 (2006).

²¹³ See LEVERETT S. LYON ET AL., *THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL* 5 (1935) (noting prevalent view “that much competition is ‘predatory’” and “that the degree of competition to which we were accustomed was . . . both a cause of the depression and a factor in its continuance”).

²¹⁴ Leslie W. Jacobs, *Regulated Motor Carriers and the Antitrust Laws*, 58 CORNELL L. REV. 90, 94–95 (1973); Arthur Donovan, *Intermodal Transportation in Historical Perspective*, 27 TRANSP. L.J. 317, 335–36 (2000).

²¹⁵ See Dempsey, *supra* note 211, at 739–40. Although the Commission, and courts, sometimes declared that economic competition was a positive factor that might weigh in favor of granting an applicant a certificate, the entire regulatory scheme demonstrated an inadequate appreciation for the role of competition in the marketplace, and an economist accustomed to the “perfectly self-evident” maxim that “[c]onsumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer,” 2 ADAM SMITH, *THE WEALTH OF NATIONS* 660 (Indianapolis: Liberty Fund, 1981) (1776), would doubtless be perplexed by the fact that under federal transportation policy, “existing carriers are ordinarily entitled to handle all traffic which they can transport adequately, efficiently and economically . . . before a competitive operation will be authorized.” Dempsey, *supra* note 211, at 742.

²¹⁶ For example, Dempsey, an outspoken advocate of entry restrictions, writing in 1977, repeatedly recited claims such as “the Commission is not precluded from determining that other factors warrant the authorization of new and

1980, applications for interstate shipping CPCNs increased, but the number of actual shippers gradually fell.²¹⁷

These entry restrictions led to higher prices and fewer economic opportunities for those wanting to enter the transportation industry. In 1980, the Motor Carrier Act²¹⁸ and the Household Goods Transportation Act,²¹⁹ as well as the appointment of market-friendly officials to the ICC, opened the door for greater competition. Although the acts did not entirely eliminate the CPCN requirement for interstate shippers of household goods, these factors liberalized the restrictions considerably. After nearly 35 years, it is plain that these reforms were an immeasurable success.²²⁰ “Deregulation”²²¹ resulted in greater competition and lower prices, and created a more dynamic marketplace in which less efficient firms are disciplined by the market and new innovations can make it to the market sooner. The number of interstate shipping firms went from

competitive operations, even where the initiation of the services will cause an existing carrier to suffer a pecuniary loss,” and cited examples in which the Commission granted CPCNs to new firms over the objections of existing firms. *Id.* at 743. But if a few swallows do not make a spring, these few examples hardly prove that the laws served the consumer interests that competition provides. Dempsey dismisses free market economics as a religious or political dogma; see, e.g., *Interstate Trucking: The Collision of Textbook Theory and Empirical Reality*, 20 *TRANSP. L.J.* 185, 189 (1992) (“The discipline of economics had not embraced an ideology with such religious passion since the Bolshevik Revolution.”), and makes no effort to address the concerns about the knowledge problem and rent-seeking that gave rise to regulatory reform in the 1980s. More importantly, the most destructive element of CPCN requirements is the way in which they stifle innovation before it is even tried, or even before it is fully articulable as a business plan—that is, they stifle competition as a discovery process. The damage such laws impose is like the coat that is never made in Henry Hazlitt’s parable of the broken window. See *ECONOMICS IN ONE LESSON* ch. 1 (Three Rivers Press, 2008) (1946). The fact that a regulatory agency occasionally allows a new business to enter the market is irrelevant to the fact that the very existence of the requirement prevents economic growth before it even begins. Needless to say, Dempsey is also silent about the consequences such laws have on the constitutional right to economic liberty.

²¹⁷ CLIFFORD WINSTON ET AL., *THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION* 8 (1990).

²¹⁸ Pub. L. No. 96-296, 94 Stat. 793 (codified at 49 U.S.C. § 10101).

²¹⁹ Pub. L. No. 96-454, 94 Stat. 2011 (codified as amended in sections of 26, 28, and 49 U.S.C.).

²²⁰ Immeasurable is the right word for it, since it is impossible to measure how much improved efficiency and increased innovation in the transportation industry spilled over into other industries. In *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 358 (2003), Dempsey portrays transportation deregulation as a failure in part because in the years that followed many airlines and other transportation companies went bankrupt. But this overlooks the fact that such consequences are typical of the “creative destruction” of capitalism. It is to be expected that firms accustomed to prospering through regulatory protection and political influence instead of attracting and satisfying customers would find it difficult to transition to an economy in which success is based on merit, rather than politics.

²²¹ This is an exaggerated and inaccurate term, as transportation remains heavily regulated at the federal level, and CPCN laws remain on the books. But the literature on the subject uses this term for the generally pro-competitive reforms mentioned.

about 18,000 in 1980 to about 50,000 by 1992.²²² One study concluded that “increased competition in the motor carrier industry has caused rate reductions that amount to \$4 billion in benefits” to consumers “and service improvements that have produced nearly another billion dollars in benefits.”²²³ Shipping was not made less safe, nor was quality diminished.²²⁴ Most important, allowing greater competition opened the door of economic opportunity to countless hardworking people, many of whom have few other options than to trade manual labor for wages.

That reform, of course, was at the federal level. State-level barriers to entry remain, and they vary widely. Alaska, for example, imposes no significant barriers on entering the moving industry. Illinois does not require applicants to notify existing firms when seeking a CPCN, but gives a state agency a nonexhaustive list of vague factors to consider, such as “a public need for the service.”²²⁵ Nevada requires a hearing for every applicant and requires officials to block any competition that would “unreasonably and adversely affect other carriers operating in the territory.”²²⁶ Research in the 1970s and 1980s showed that barriers to entry raised prices for intrastate household goods services by anywhere from 25 to 40 percent,²²⁷ and those higher prices were not associated with any increase in quality.²²⁸ Findings from other sectors of the transportation industry also show that CPCN laws tend to raise prices, stifle innovation, and

²²² Thomas Gale Moore, *Clearing the Track: The Remaining Transportation Regulations*, REGULATION, Mar./Apr. 1992, at 81.

²²³ WINSTON ET AL., *supra* note 217, at 28.

²²⁴ Thomas Gale Moore, *Rail and Truck Reform—The Record So Far*, REGULATION, Nov./Dec. 1983, at 33–41.

²²⁵ ILL. COMP. STAT. 5/18c-4204.

²²⁶ NEV. REV. STAT. §§ 706.391, 706.151(1)(e).

²²⁷ Breen, *supra* note 5, at 178. Writing before federal deregulation, Breen used various tools to determine the increased cost to consumers imposed by barriers to entry. First, he sought to determine the capitalized value of the monopoly rents associated with a CPCN by comparing CPCN resale values. *See id.* at 176. He then also compared intrastate household goods movers in Maryland, which at the time lacked significant barriers to entry, with interstate movers regulated by the ICC. *Id.* at 178.

²²⁸ Edward A. Morash, *Entry Controls on Regulated Household Goods Carriers: The Question of Benefits*, 13 TRANSP. L.J. 227, 240 (1984). Morash focused on interstate movers, but there is no reason to doubt that his conclusion—that “entry controls as manifested by [household goods] carrier certificate restrictions do not benefit consumers,” *id.*—would be any different for intrastate operations.

restrict economic opportunity. A 1994 survey found that in states with strict barriers to entry into the freight trucking industry, consumers had to pay up to 25 percent more.²²⁹ Data from cities that have reduced barriers to entry into the taxicab market show that the cartels established by CPCN laws raise costs to consumers.²³⁰ After Indianapolis lifted its cap on the number of taxicab permits available, the number of cabs nearly doubled, fares decreased by an average of 7 percent, waiting times were almost halved, and customer complaints diminished.²³¹ Other countries have also reported that significant innovations were introduced after deregulation.²³²

Despite these obvious benefits, there remain powerful obstacles to reform at the state level. Beneficiaries of CPCN restrictions exercise powerful influence to prevent competition, and the dispersed costs that licensing restrictions impose on the consuming public, along with consumers' rational ignorance,²³³ make reform in the states exceedingly unlikely.

B. Possible Federal Reforms

As this article has shown, courts have largely failed to protect economic freedom against state deprivations. While efforts continue to persuade courts to enforce this central constitutional right, more immediate reform would have to come from Congress. Although the need for greater federal protection of economic liberty is too broad a subject to fully address in this case

²²⁹ See Timothy P. Daniel & Andrew N. Kleit, *Disentangling Regulatory Policy: The Effects of State Regulations on Trucking Rates*, Federal Trade Commission Working Paper No. 205 at 45 (July, 1994).

²³⁰ See, e.g., Mark W. Frankena & Paul A. Pautler, *Taxicab Regulation: An Economic Analysis*, 9 RESEARCH IN L. & ECON. 129, 157 (1986) ("No persuasive economic rationale is available" for restrictions on firms, vehicles, and minimum fares.); Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* 101 (FTC Bureau of Economics Staff Report, May 1984).

²³¹ Adrian T. Moore & Tom Rose, *Regulatory Reform at the Local Level: Regulating for Competition, Opportunity, and Prosperity*, Reason Foundation Policy Study No. 238, at 15–16 (1998).

²³² Sean D. Barrett, *Regulatory Capture, Property Rights and Taxi Deregulation: A Case Study*, 23 Econ. Aff. 34 (2003); Organization for Economic Development Policy Roundtables, *Taxi Services: Competition and Regulation* 2007 at 7 (2008); Jason Soon, *Taxi!!: Reinvigorating Competition in the Taxi Market*, Centre for Independent Studies Issue Analysis, No. 7 at 9 (May 1999).

²³³ See generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013).

study,²³⁴ I will sketch three suggestions for possible reform and briefly address the obvious objections to them.

1. Civil rights legislation. Federal civil rights legislation to protect the right to economic liberty would have signal advantages. The right itself has a strong foundation in constitutional history and the history of civil rights law that entitles it to status alongside free speech or freedom of religion as a right all persons should securely enjoy.

Civil rights legislation to protect economic liberty would accomplish three central goals. First, it would make an important statement to the courts that this right deserves first-class status and should not be relegated, as it typically is in courts today, to the status of a poor relation.²³⁵ Second, it would entitle Congress to abrogate state sovereign immunity—often a powerful obstacle to those seeking to vindicate civil rights.²³⁶ Third, it would help make the protection of economic liberty a priority for federal enforcement officials—who already enforce other federal civil rights protections—instead of placing the burden on the scattered entrepreneurs and private organizations that today seek to protect this crucial civil right through public interest lawsuits.²³⁷

The major objection to this reform is that courts are skeptical of legislative efforts to secure rights that courts themselves have construed narrowly. The most notable example is the

²³⁴ I discuss the subject more thoroughly in *RIGHT TO EARN A LIVING*, *supra* note 8. *See also* NEILY, *TERMS OF ENGAGEMENT*, *supra* note 203; CLINT BOLICK, *TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT* ch. 4 (1998).

²³⁵ The Supreme Court used this term in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), when claiming that property rights and economic freedom should not be regarded as second-class rights. *See also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (“the dichotomy between personal liberties and property rights is a false one”). Unfortunately, the Court doth protest too much, and that unjustifiable dichotomy persists in our constitutional law.

²³⁶ *See generally* *Nevada v. Hibbs*, 538 U.S. 721 (2003).

²³⁷ No federal government office regularly litigates to protect economic liberty against state infringement. The Department of Justice’s Civil Rights Division, the Equal Employment Opportunity Commission, and other institutions focus primarily on enforcing antidiscrimination statutes. Constitutional protection for economic liberty has largely been the work of private organizations such as the Pacific Legal Foundation and the Institute for Justice. *See generally* CLINT BOLICK, *DEATH GRIP: LOOSENING THE LAW’S STRANGLEHOLD OVER ECONOMIC LIBERTY* (2011). There ought to be an office of economic liberty within the Department of Justice’s Civil Rights Division.

back and forth between Congress and the Court over RFRA, which attempted to increase the level of judicial scrutiny that courts should apply in Establishment Clause cases. In *City of Boerne v. Flores*,²³⁸ the Court struck down RFRA, holding that while the Fourteenth Amendment allows Congress to protect *existing* constitutional rights, those protections must be “congruent and proportional” to a demonstrable pattern of unconstitutional acts—and, moreover, holding that Congress may not add new constitutional rights, or expand protections beyond those provided in the Constitution, as the Court has interpreted them. Building on that holding, the Court in *University of Alabama v. Garrett*²³⁹ found that the Americans with Disabilities Act went too far in stripping states of sovereign immunity, because Congress had not demonstrated “a pattern of discrimination by the States which violates the Fourteenth Amendment.”²⁴⁰ As a result, the Act was not “appropriate legislation” under the Amendment. Yet the Court based this finding on its own prior precedents, which found that discrimination against the disabled was subject only to rational basis review. In other words, the Court itself had concluded that “[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational,”²⁴¹ and Congress’s attempt to impose such a requirement by statute was an effort “to rewrite the Fourteenth Amendment law laid down by this Court” in its rational basis precedents.²⁴²

Unlike access for the disabled, economic liberty has a strong pedigree in the history of constitutional freedoms,²⁴³ and it would be easy to demonstrate the systematic violation of that freedom by state governments. Yet some courts would likely view an effort to protect economic

²³⁸ 521 U.S. 507 (1997).

²³⁹ 531 U.S. 356 (2001).

²⁴⁰ *Id.* at 374.

²⁴¹ *Id.* at 367. *See also id.* at 370 (“‘adverse, disparate treatment’ often does not amount to a constitutional violation where rational-basis scrutiny applies”).

²⁴² *Id.* at 374.

²⁴³ *See supra* note 8.

liberty with anything more than minimal rational basis scrutiny as an effort to “rewrite the Fourteenth Amendment [precedent].”²⁴⁴

To avoid intruding on the judiciary’s rightful role as expositor of the Constitution, while simultaneously reasserting the centrality of economic liberty, civil rights legislation for economic liberty would have to be accompanied by thorough documentation of the states’ violations of this right and should be framed along the lines of the 1866 and 1964 Civil Rights Acts. Such legislation should also make clear that states retain sufficient room to engage in legitimate regulation. Wording along the following lines may be appropriate: “all adult persons, except as a punishment for crime whereof the party shall have been duly convicted, shall be free, in every state and territory in the United States, to make and enforce contracts; to earn, purchase, sell, hold, and convey real and personal property; and to pursue lawful occupations, subject only to such restrictions as substantially protect the public health and safety. . . .” Such a law would satisfy the “congruent and proportional” test, and would not impose positive claims on states, only negative obligations not to interfere. It would also not attempt to invent a new type of right, or impose expensive mandates to provide access, as the ADA did, but it would bar states from imposing new burdens on citizens or from intruding on a right of long historical standing. And whereas the *Garrett* Court noted that Congress had not shown that the disabled were victims of systematic state discrimination, a pattern of state violation of economic freedom can be plausibly demonstrated.

Another way to alleviate concerns about congruence and proportionality would be to frame civil rights legislation for economic liberty specifically in terms of enforcing the Fourteenth Amendment’s Privileges or Immunities Clause, which has been neglected since the

²⁴⁴ *Garrett*, 531 U.S. at 374.

1873 *Slaughter-House Cases*²⁴⁵ essentially nullified that portion of the Amendment. Note that the *Slaughter-House* Court did *not* deny that economic liberty is a constitutional right. It only denied that that Amendment entrusted protection of such a right to federal courts.²⁴⁶ In the years since, many decisions—albeit under the Due Process Clause or other provisions—have made clear that the right to economic liberty *is* one of the many civil rights “placed under the special care of the Federal government,”²⁴⁷ because it is part of the “liberty” protected by the Fourteenth Amendment.²⁴⁸ The “congruent and proportional” test is primarily concerned with ensuring that Congress does not alter the substance of constitutional rights, but the *Slaughter-House* decision denied not the existence of the constitutional right to economic liberty, but only that federal courts had a role in protecting such a right. On that point, *Slaughter-House* has been abrogated. Yet the Privileges or Immunities Clause remains largely unenforced. It would therefore be difficult for courts today to characterize civil rights legislation explicitly designed to give effect to that Clause as an effort to interfere with judicial prerogatives or to rewrite “the metes and bounds of [a] constitutional right.”²⁴⁹

A “detailed but limited remedial scheme”²⁵⁰ for securing economic liberty against abuse by state governments, while leaving them sufficient room to regulate for the actual protection of public safety, falls well within Congress’s constitutional power.

²⁴⁵ 83 U.S. (16 Wall.) 36 (1873).

²⁴⁶ The *Slaughter-House* Court did question whether the Louisiana Slaughter-House Act actually established a monopoly that would have been invalid at common law, but it never denied that the butchers had a right at common law to pursue their trade. *See* 83 U.S. (16 Wall.) at 59–66. Instead, it held that this right “belong[s] to citizens of the States as such,” so that it was “left to the State governments for security and protection.” *Id.* at 78.

²⁴⁷ *Id.*

²⁴⁸ *See, e.g.,* *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (citing cases).

²⁴⁹ *Garrett*, 531 U.S. at 368.

²⁵⁰ *Id.* at 373.

2. *Spending Clause*. If Congress wishes to protect economic liberty without invoking its Fourteenth Amendment authority, it could also employ its Spending Clause powers by conditioning federal spending on states' providing greater security for economic liberty. The obvious model here is the Religious Land Use and Institutionalized Persons Act (RLUIPA). Like RLUIPA, such a statute would condition the receipt of federal financial assistance on the state's compliance with a rule such as the following: "No government shall impose or implement a licensing requirement on a trade or occupation in a manner that imposes a substantial burden on the economic liberty of a person, unless the government demonstrates that imposition of the requirement on that person (a) furthers the protection of public health or safety; and (b) is the least restrictive means of furthering that protection"

Although there are limits to Congress's power to use funding to rein in the states, those limits are quite broad, and under present doctrine, this proposal would easily fall within them.²⁵¹ But even under the narrower interpretation of the Spending Clause advocated by Justice Clarence Thomas, such a proposal would be within Congress's authority so long as it were obviously, simply, and directly connected to the purpose to which the funds were devoted.²⁵² This goal would be easily accomplished by imposing this condition on the receipt of federal job-training funds or unemployment relief funds. If the federal government is to fund programs relating to job creation or employment training, it makes sense to demand that states, in turn, respect the rights of entrepreneurs and business owners to engage in a trade without unjust interference.

Some are reluctant to use the spending power in this way, noting that Congress has often abused this power to effectively take control over matters that ought to be left to the

²⁵¹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601–8 (2012).

²⁵² See, e.g., Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring).

states. While it is true that Congress has unjustly exploited the Spending Clause in the past,²⁵³ this proposal should not raise such concerns. A condition on spending that requires states to respect the preexisting rights of citizens is far less intrusive than programs that force states to provide positive benefits, or to conform their laws to federal regulatory mandates. And while federalism is offended when Congress exploits the spending power to evade constitutional limits, this proposal does precisely the opposite: it would give effect to existing, but neglected, federal power to protect a longstanding constitutional liberty. Spending Clause jurisprudence specifies that a condition on the receipt of funds is valid so long as it is in pursuit of the general welfare,²⁵⁴ the conditions are related to the federal interest in national projects or programs,²⁵⁵ and it does not induce states to act in unconstitutional ways²⁵⁶ or use the threat of withdrawing funding to commandeer states to do things Congress could otherwise not demand of them.²⁵⁷ But requiring states to demonstrate a realistic justification before limiting citizens' economic liberty—which the Court already recognizes is within the Fourteenth Amendment's protections²⁵⁸—would serve the general welfare, is related to federal interests in preserving constitutional freedom, and is well within the federal government's power to protect civil rights against state intrusion.

²⁵³ See generally Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, 2004 CATO SUP. CT. REV. 119; Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001); John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

²⁵⁴ *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987).

²⁵⁵ *Id.* at 207–08.

²⁵⁶ *Id.* at 210.

²⁵⁷ *NFIB*, 132 S. Ct. at 2601–8.

²⁵⁸ It is worth emphasizing that while the Court has applied the deferential standard of rational basis scrutiny with regard to economic liberty, it has *never* “held . . . that the ‘liberties’ protected by Substantive Due Process do not include economic liberties,” as Justice Scalia asserted in *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (op. of Scalia, Thomas, Alito, JJ., and Roberts, C.J.). On the contrary, the Court has always held that economic liberty is one of the rights protected by the Due Process Clause. See, e.g., *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (citing cases).

C. Antitrust Immunity Reform

A third reform would limit the judge-made doctrine of *Parker* antitrust immunity.²⁵⁹ Named for the 1942 case in which it originated,²⁶⁰ this doctrine holds that when private entities engage in anticompetitive behavior pursuant to state law, they are immune from prosecution under federal anti-monopoly laws. Thus, while a group of moving companies that engaged in price-fixing or that sought to block new firms from entering the industry would be subject to severe penalties under the Sherman Antitrust Act and similar laws, they are exempt from those laws if the state designates that cartel the “State Moving Board.”²⁶¹ Chief Justice Warren Burger described the irrationality of this exemption well when he wrote that if the antitrust laws were ““meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,” it is “wholly arbitrary” to treat government-imposed restraints of trade as “beyond the purview of federal law.”²⁶² Fortunately, a case just decided by the Supreme Court offers an opportunity to fix this arbitrariness.

In *North Carolina Board of Dental Examiners v. FTC*²⁶³ the Court declined to extend *Parker* immunity to a state regulatory agency that threatened to prosecute non-dentist teeth whiteners for engaging in dentistry without a license. Teeth whitening is a process in which a plastic strip or mouth tray treated with peroxide or another whitening agent is placed on the

²⁵⁹ See further Timothy Sandefur, *Reining in Antitrust Immunity*, REGULATION, Fall 2014, at 16.

²⁶⁰ *Parker v. Brown*, 317 U.S. 341 (1943).

²⁶¹ See, e.g., *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

²⁶² *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 419 (1978) (opn. of Burger, C.J.) (quoting *Atlantic Cleaner & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932)). See also Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 669–70 (1991) (“[T]he notion that state regulatory interests can trump conflicting interests embodied in constitutionally valid federal statutes defies our ordinary understanding of preemption law. . . . If . . . there is a genuine conflict between state regulation and federal antitrust law, state regulation cannot preempt federal law. . . . Yet preemption of federal law is exactly what in effect follows from a finding of state action immunity under the current paradigm, for the state regulation nullifies the application of federal law to an anticompetitive restraint that (by hypothesis) would otherwise be within its scope.”).

²⁶³ 2015 WL 773331 (U.S. Feb. 25, 2015).

teeth, left in place for several minutes, then removed, making the teeth appear whiter. It is a safe process that one can do at home with a kit available over the counter.²⁶⁴ At the behest of practicing dentists who objected to economic competition,²⁶⁵ the Dental Board sent some 47 cease and desist orders to cosmetologists and other entrepreneurs who were providing teeth-whitening services in their businesses.²⁶⁶ In response, the Federal Trade Commission brought an antitrust action against the Board.

The North Carolina Dental Board is made up of practicing dental professionals elected to their positions by other practicing dentists, all of whom have an obvious private incentive to restrict competition against their own guild. Such an entity must at least be actively supervised by independent state officials before it can enjoy antitrust immunity under *Parker* and its progeny. As the Supreme Court has previously explained, “Absent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the [entity]’s individual interests.”²⁶⁷ The lack of meaningful, independent oversight of the Board’s activities well justifies the denial of *Parker* immunity. But the Supreme Court should not have stopped there. It should also require that state law actually mandate any barrier to entry that private parties implement in the state’s name, and that any such barrier substantially advance an important government interest.²⁶⁸

²⁶⁴ See generally Angela C. Erickson, *White Out: How Dental Industry Insiders Thwart Competition from Teeth-Whitening Entrepreneurs* (Institute for Justice, Apr. 2013), available at http://www.ij.org/images/pdf_folder/other_pubs/white-out.pdf (last visited Nov. 16, 2014).

²⁶⁵ The FTC observed, “Dentists who performed teeth whitening services . . . complain[ed] to the Board about the provision of teeth whitening services by non-dentists. These complaints often noted that these new providers charged less than dentists but rarely mentioned any public health or safety concerns.” *In the Matter of the N. Carolina Bd. of Dental Examiners*, 2011-2 Trade Cas. (CCH) ¶ 77705 (MSNET Dec. 7, 2011), 2011 WL 6229615 at *7. However, it also noted that “Courts have rejected social welfare and public safety concerns as cognizable justifications for restraints on competition.” *Id.* at *30.

²⁶⁶ *N. Carolina State Bd. of Dental Exam’rs*, 717 F.3d at 365.

²⁶⁷ *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

²⁶⁸ See generally Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism: North Carolina Board of Dental Examiners v. FTC*, 2014–2015 CATO SUP. CT. REV. ___ (forthcoming, 2015).

Before its 1985 decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*,²⁶⁹ the Court denied antitrust immunity to private actors unless state law explicitly commanded their anticompetitive conduct. A state’s mere “authorization, approval, encouragement, or participation in restrictive private conduct” was insufficient.²⁷⁰ Thus, in *Goldfarb v. Virginia State Bar*,²⁷¹ the Court denied immunity to a private entity that imposed dues assessments on attorneys that constituted a price-fixing arrangement, because “the threshold inquiry in determining if an anticompetitive activity is state action . . . is whether the activity is required by the State acting as sovereign.”²⁷² No statute or regulation imposed that restraint on trade, so the bar could not use state sovereignty to insulate itself from antitrust liability: “The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”²⁷³ But in *Southern Motor Carriers*, the Court diluted this requirement and held that private parties could violate antitrust law with impunity so long as state law “expressly *permits*, [even if it does] not compel, anticompetitive conduct.”²⁷⁴ This ruling allows states to empower private parties to restrict entry, impose binding price-fixing arrangements, and otherwise illegalize competition merely by “adopt[ing] a permissive policy”²⁷⁵—that is, by leaving it to the private parties to decide whether to do so.

The lax “permissive policy” rule of *Southern Motor Carriers* should be abandoned. It encourages states to couch their economic policies in vague terms that give regulatory entities the broadest possible discretion in restricting the market while at the same time allowing

²⁶⁹ 471 U.S. 48 (1985).

²⁷⁰ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592–93 (1976).

²⁷¹ 421 U.S. 773 (1975).

²⁷² *Id.* at 790.

²⁷³ *Id.* at 791.

²⁷⁴ *Southern Motor Carriers*, 471 U.S. at 61.

²⁷⁵ *Id.* at 62.

politicians to disclaim responsibility if the entity takes steps that prove unpopular. This system reduces transparency and accountability and creates an incentive for government to delegate broad and unspecified power to private entities—always a dangerous prospect. If states “choose to displace the free market,” antitrust law should at least ensure that it is “clear that the State is responsible for the [anticompetitive rules] it has sanctioned and undertaken to control.”²⁷⁶ Also, a “permissive policy” that specifies no objective legal command but allows the private entity to devise its own policies cannot ensure that the entity is acting within the boundaries of the state’s consciously adopted economic policy.²⁷⁷ When states grant private parties broad, “permissive” authority to engage in anticompetitive conduct, those parties can exercise “unguided discretion”²⁷⁸ to choose the extent to which they think competition ought to be displaced—often in the face of conflicts of interest and at the cost of political accountability, as the North Carolina case demonstrates. If states cannot exempt people from federal antitrust law merely “by authorizing them to violate it, or by declaring that their action is lawful,”²⁷⁹ the “permissive policy” rule must be abandoned.

The *Southern Motor Carriers* Court justified its broader authorization of immunity on the grounds that limiting immunity to cases where state laws actually compel the anticompetitive conduct would “reduce[] the range of regulatory alternatives available to the State.”²⁸⁰ But if the

²⁷⁶ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

²⁷⁷ See John F. Hart, “Sovereign” *State Policy and State Action Antitrust Immunity*, 56 *FORDHAM L. REV.* 535, 571 (1988) (“The displacement-of-competition standard, in supporting immunity for a substantial class of restraints instituted by state agencies or local government that cannot plausibly be said to implement state policy, defeats the Court’s objective of confining immunity to those restraints that implement state policy.”).

²⁷⁸ C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 *B.C. L. REV.* 1059, 1106 (2000) (In such a case, “it is illusory to view the state legislature as the ‘politically accountable’ source of a state policy that in fact has been adopted by the agency itself.”).

²⁷⁹ *Parker*, 317 U.S. at 351.

²⁸⁰ 471 U.S. at 61.

antitrust laws “reflect a basic *national* policy favoring free markets over regulated markets,”²⁸¹ then restricting states’ “regulatory alternatives” to those that do not unduly restrain competition is a feature, not a bug. Moreover, a consistently enforced presumption against antitrust immunity actually helps states to craft economic policies by ensuring certainty and a stable rule of law.²⁸² The lenient rule of *Southern Motor Carriers* warrants one critic’s conclusion that “the ideology of federalism has displaced a national model of competition for one favoring state-based resolutions.”²⁸³ But a proper understanding of federalism must always ensure that whatever discretion states enjoy is cabined by federal limits that protect individual freedom, including economic liberty. Whatever one’s opinion of antitrust law in general, there is no justification for allowing states broad latitude to disregard federal law and erect private cartels with only vague instructions and loose oversight.

Finally, given the constitutional liberty concerns involved when the state imposes barriers to entry such as licensing laws, the Court should impose a substantive, rather than a merely procedural, limit on the power of states to exempt official cartels from antitrust scrutiny. States should not be free to empower existing firms to bar new entrants from the market merely by enacting legislation declaring such behavior to be state policy. Instead, legal barriers to entry should satisfy some meaningful standard of means-ends scrutiny. Different scholars have

²⁸¹ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 388 (1991) (emphasis added); see also *Lafayette*, 435 U.S. at 413 (plurality opinion) (antitrust laws “reflect[]” the “[n]ation’s economic goals”). I do not mean to suggest that I agree with the claim that antitrust law in general is compatible with economic liberty. On the contrary, antitrust law consists of “political decisions misleadingly portrayed as law and economics.” EDWIN S. ROCKEFELLER, *THE ANTITRUST RELIGION* 103 (2007). But if one assumes the premise that these laws exist to foster economic competition and that “antitrust laws are designed to protect consumers, not competitors,” *Arani v. TriHealth Inc.*, 77 F. App’x 823, 825 (6th Cir. 2003), then the irrationality of exempting the entity best positioned to create monopolies—the government—is truly senseless. See further Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL’Y 203, 205 n. 1 (2000).

²⁸² See *Ticor*, 504 U.S. at 636 (“By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States’ regulatory flexibility.”).

²⁸³ E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism’s Triumph over Competition, the Last Fifty Years*, 3 WASH. U. J.L. & POL’Y 473, 511 (2000).

suggested various formulations,²⁸⁴ but I have proposed the intermediate standard: “substantially advances an important government interest.”²⁸⁵ Such a standard would require a state to articulate an important goal to be accomplished by exempting private parties from federal antitrust laws, and require that the exemption actually serve that end.²⁸⁶ Because it is not as demanding as strict scrutiny, this standard would allow states flexibility to impose anticompetitive measures where necessary to promote important public goals, while still ensuring that the *Parker* immunity test does not become a “purely formalistic” exercise.²⁸⁷ If state immunity from the antitrust laws is granted “out of respect for . . . the State, not out of respect for the economics of price restraint”²⁸⁸ or other anticompetitive policies, then the flexibility accorded to states under the antitrust laws should mirror the flexibility accorded to states when they deviate from other federal legal or constitutional baselines. The intermediate substantial advancement test would still allow states to authorize private parties to restrain trade where doing so is important, but it would help ensure that entrepreneurs are not wholly at the mercy of the firms that have the strongest incentive in vetoing new competition.

²⁸⁴ See, e.g., Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1145–50 (2014) (proposing a Rule of Reason requirement); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 756 (1986) (proposing requirement of a showing of market failure); Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DEPAUL BUS. & COM. L.J. 105, 147–50 (2006) (proposing a “reasonableness” inquiry). *But see* Elhauge, *supra* note 262, at 667 (proposing stricter procedural limits).

²⁸⁵ See Brief Amicus Curiae Pacific Legal Foundation and Cato Institute, *N.C. Bd. of Dental Exam’rs v. FTC*, No. 13-534 at 25–33.

²⁸⁶ *Cf.* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (“substantial advancement” test “asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose”); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (substantial advancement test not satisfied by “administrative ease and convenience” or other weak justifications).

²⁸⁷ *Hallie*, 471 U.S. at 39.

²⁸⁸ *Ticor*, 504 U.S. at 633.

D. Potential Federalism Objections

The most common objection to the reforms I have proposed is that for courts to invalidate state restrictions on economic liberty violates democratic values by imposing the will of unelected judges in the place of the will of the people’s representatives. According to this view, economic matters are sufficiently policed by the political process; people harmed by wrongheaded economic regulations should seek reform from the legislature rather than asking courts to intervene.²⁸⁹ This argument is typically framed both in democratic terms generally and in federalism terms specifically: court intervention is counter-majoritarian, and federal intervention is especially inconsistent with the principle of state autonomy central to our federalist system. Both branches of this argument must fail in cases such as those described in this article.

First, the democratic political process cannot be counted on to protect the rights of entrepreneurs like Raleigh Bruner and Maurice Underwood, who lack the political influence and sophistication of their rent-seeking rivals. Established, well-connected firms with lobbying experience and with long-term connections to legislators and administrative agencies have little to fear from an unknown, would-be business owner who lacks any constituency or wealth and who has little opportunity to even voice his concerns to the general public. Such entrepreneurs are in an even worse position than the “discrete and insular minorities” who are promised

²⁸⁹ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730–31 (1963); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487–88 (1955); *Star Scientific Inc. v. Beales*, 278 F.3d 339, 349 (4th Cir. 2002); *Bd. of Trustees of W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1402–3 (9th Cir. 1984). See also Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 276 (2008) (“In its opinions evaluating economic legislation, the Warren Court consistently applied a hands-off approach that reflected an underlying respect for the legislative process.”); Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 363 (1995) (“Liberals assumed that judicial intervention was unnecessary to protect economic rights because the powerful business interests typically burdened by liberal economic regulation are fully capable of defending themselves through the political process.”).

judicial protection against the abuse of the democratic process,²⁹⁰ they are the “‘anonymous and diffuse’ [who] . . . are systematically disadvantaged in a pluralist democracy.”²⁹¹

Also, to relegate their concerns to the democratic process is to commit a serious category error. The premise of the Constitution is that while democracy is the proper way to resolve disputes over *policy*, it is *not* the proper way to resolve disputes over *principle*—that is, over *rights*. Both in the classical liberal theory underlying the Constitution and in the text itself, liberty is outside the reach of legitimate democratic decision-making.²⁹² Bruner, Underwood, and other entrepreneurs suffering from the restrictions of abusive licensing laws are not complaining about economic policy, but about the violation of their liberty. To relegate their concerns to the political process is essentially to prejudice their cases by concluding that they have no rights in the matter that the legislative process is bound to respect.

The federalism version of the objection is that proposals of this kind transfer decision-making authority from the states, where officials are presumably more accountable to voters, and empower federal officials, who are less accountable and possibly less informed about local needs.²⁹³ Leaving decisions about the scope of business practices at the state level fosters competitive federalism.

But the Constitution does not regard local control or state autonomy as goods in themselves. On the contrary, the founders understood that rent-seeking “factions” often exploit state power to restrict economic opportunity, harm consumers, and enrich themselves.²⁹⁴ Absent some supervening authority, states will be strongly tempted to sacrifice the interests of weaker

²⁹⁰ *Carolene Products*, 304 U.S. at 152 n.4.

²⁹¹ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985).

²⁹² *Barnette*, 319 U.S. at 638.

²⁹³ See, e.g., J. Harvie Wilkinson, *Federalism for the Future*, 74 S. CAL. L. REV. 523, 525 (2001).

²⁹⁴ See generally THE FEDERALIST Nos. 10 and 51, *supra* note 33, at 56–65, 347–53.

parties, transforming a system designed to promote liberty into 50 quarreling tyrannies. The whole reason for writing the Constitution was to clamp down on such abuses, which were tearing the young nation into a collection of rancorous states.²⁹⁵ One benefit of the proposed Constitution was that a “compound republic”²⁹⁶ enables the federal government to check local tyranny and provides “a double security . . . to the rights of the people.”²⁹⁷

To the complaint that such supremacy would interfere with state prerogatives, Madison answered that the American Revolution had not been effected, nor “the precious blood of thousands spilt, and the hard-earned substance of millions lavished,” so that “the government of the individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty.” Instead, the purpose of the American system was to prioritize “peace, liberty, and safety” over government autonomy. To say otherwise would be to “forget[] that the public good, the real welfare of the great body of the people, is the supreme object to be pursued. . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.”²⁹⁸ In short, local autonomy is an instrumental good, valuable only insofar as it respects and protects individual rights.

The experience of the Civil War era, when state governments trampled with impunity on citizens’ rights, taught the nation the need for stronger federal protection against states, which came in the form of the Fourteenth Amendment. It struck a balance between local autonomy on day-to-day matters and federal protections for civil rights, including the right to earn a living.

²⁹⁵ Richard Epstein does an excellent job of pointing out the bizarre double standard by which rent-seeking factions at the state level are kept in check by rigorous judicial scrutiny under the Dormant Commerce Clause, but are allowed free rein under the rational basis test in cases involving the Due Process Clause and other provisions. See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* ch. 15 (2013).

²⁹⁶ FEDERALIST No. 51 (James Madison), *supra* note 33, at 351.

²⁹⁷ *Id.*

²⁹⁸ *Id.* No. 45 (James Madison) at 309.

Objections to federal protection for economic liberty, therefore, fare no better than do objections to the protection of other federal civil rights. To complain that such protections would interfere with state autonomy, or with the ability of states to act as “laboratories,” is to ignore the entire purpose of the “compound republic” and the Fourteenth Amendment, which is to prevent states from “experimenting” in ways that violate individual rights. On the other hand, to protest that federal protections for economic liberty would interfere with valid concerns about local autonomy and decision making is a red herring. Meaningful protection for economic liberty respects the value of local policymaking; it just ensures that those policies respect the constitutional boundaries drawn to protect individual rights. Certainly nobody would contend that states should be free to censor speech or violate privacy or seize property without compensation in the name of state autonomy and federalism. Nor should states be free to deprive people of economic freedom with impunity. In short, competitive federalism, or states working as laboratories, is only a virtue when states compete to provide people with “peace, liberty, and safety.” When instead they abuse their autonomy to deprive people of individual rights, state autonomy becomes a vice—one the Fourteenth Amendment was designed to redress.

While local officials may indeed be more responsive to voters and more knowledgeable about local circumstances, this fact only justifies leaving them in charge of policy concerns. It cannot justify giving them power to make decisions that violate individual rights. Once again, as the *New State Ice* Court recognized, state experimentation must take place within the boundaries of constitutional restraints that preserve individual freedom. One would hardly excuse state violation of religious freedom or freedom of speech on the theory that local officials are more responsive to the voters’ desires for persecution or censorship, or that federal officials lack the knowledge necessary to adequately establish a religion or silence dissent. Likewise, federalism arguments for

local autonomy collapse when they are applied to the category of individual rights—a category the Constitution rightly places beyond the reach of government at either the federal or local levels.

Further, while it is possible that state officials could be better versed in local needs, they are just as likely to be corrupted or misled by local interests. One of the great theoretical achievements of the Constitution’s authors was to reject the arguments of Montesquieu and other thinkers who contended that democratic forms of government operated better at the local level. Instead, the founders pointed out, local decision makers are more likely to be swayed by “some common impulse of passion, or of interest, adverse to the rights of [the] citizens” than the leaders of a large society in which interest groups balance each other out.²⁹⁹ A large federal republic would prevent the mischiefs of faction by transferring decision making to a body that would represent larger national constituencies, thus making it more difficult for interested groups to “unite and oppress the weaker” groups.³⁰⁰ What the system lost local knowledge by lawmakers, it gained in objectivity and disinterestedness by those in charge.³⁰¹ Federal protections for individual rights rightly transfer some decisions to officials who are detached from local controversies and prejudices.

A final argument against federal intervention is that it reduces the incentives for citizens to take their responsibilities seriously. As Judge J. Harvie Wilkinson puts it, “local government is our Tocquevillean residue of participatory democracy, and the erosion of local control diminishes the say—and stake—of each citizen in public life.”³⁰² But meaningful constitutional protection against

²⁹⁹ THE FEDERALIST No. 10 (James Madison), *supra* note 33, at 57.

³⁰⁰ *Id.* No. 51 (James Madison) at 352.

³⁰¹ One sees this tension at work in antebellum debates over slavery, or post-war debates over civil rights, when Southern spokesmen complained about Yankee interlopers interfering with “domestic institutions”—that is, racist policies—over which they allegedly knew nothing. It was precisely the fact that Northerners were more disinterested and objective that allowed them to recognize its evil, while Southerners accused them of not knowing enough about the subjects.

³⁰² Wilkinson, *supra* note 293, at 539.

the predations of legislative majorities or local factions is *part* of our American constitutional democracy. Unfettered local autonomy has never been our constitutional rule, and excessive local power can just as easily damage the values of citizenship by empowering factions to “sacrifice the weaker party or an obnoxious individual.”³⁰³ Moreover, unjust restrictions on economic liberty sap the qualities of entrepreneurship, independence, and the other bourgeois virtues that have long been a part of a healthy conception of civic responsibility and social participation.³⁰⁴ Perhaps worst of all, the *lack* of meaningful judicial protections encourages government officials to violate individual freedoms and abuse their power—thus reducing the incentive for them to take *their* responsibilities seriously. In the absence of federal checks and balances, public officials can all too easily be misled or corrupted into abusing their trust. Wilkinson concedes as much when he acknowledges that “local governments are more likely to infringe personal liberties because their actions are less visible, affect citizens’ lives more intimately, and are less insulated from the tyrannical forces of Madisonian factionalism.”³⁰⁵

Some have argued that states should be the primary vehicles for reform.³⁰⁶ It would be a welcome development if states would ramp up protections for economic liberty as a matter of state law, and some states have made encouraging progress in that direction. But “experience has taught mankind the necessity of auxiliary precautions.”³⁰⁷ Experience has at least shown that states cannot be relied on to protect economic liberty without some oversight, any more than they can be expected to provide sufficient protection for free speech, freedom of religion, or other individual rights. “Monarchy unaccountable is the worst sort of tyranny,” said John

³⁰³ THE FEDERALIST No. 10 (James Madison), *supra* note 33, at 61.

³⁰⁴ See further Sandefur, *Insiders, Outsiders*, *supra* note 48, at 399–407.

³⁰⁵ Wilkinson, *supra* note 293, at 539.

³⁰⁶ See, e.g., Clint Bolick, *Brennan’s Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom*, 12 TEX. REV. L. & POL. 137, 153–58 (2007).

³⁰⁷ THE FEDERALIST No. 51 (James Madison), *supra* note 33, at 349.

Milton.³⁰⁸ A healthy federalism recognizes that states unaccountable are equally untrustworthy, and that federal protection against factional abuses within the states is essential to the goals of constitutional government.

V. Conclusion

Occupational licensing is a major burden on economic liberty. It raises prices, restricts consumer choice, and deprives countless Americans of their right to earn a living for themselves and their families—often for no better reason than to enrich existing, politically influential firms. Among the worst of such abuses is the certificate of public convenience and necessity law, which does not even purport to protect the consumer against dangerous business practices or against incompetent or dishonest practitioners, but is explicitly designed to prevent economic competition. Whatever the value such a barrier to entry might have in certain unusual markets—a doubtful proposition on its own—the CPCN has been applied far beyond those markets. Today, in markets such as the household goods moving industry, honest, hardworking entrepreneurs find the path to economic liberty blocked simply because bureaucrats think more competition is “undesirable.” The recent decision in *Bruner v. Zawacki* is a hopeful sign—and a stark demonstration of the abusive consequences of CPCN laws—but it is only a first step. Greater federal protection for economic liberty, in the form of civil rights legislation or conditions on federal spending, would go far to protect the right to earn a living. Federalism-based objections to such protection fall short. Protecting economic freedom—“the most precious liberty that man possesses”³⁰⁹—must take precedence.

³⁰⁸ John Milton, *Tenure of Kings And Magistrates* (1649), reprinted in WILLIAM KERRIGAN ET AL., *THE COMPLETE POETRY AND ESSENTIAL PROSE OF JOHN MILTON* 1030 (2007).

³⁰⁹ *Barsky*, 347 U.S. at 472 (Douglas, J., dissenting).

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